



## I N D E X

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1 (Jury not present)

2 THE COURT: You wanted to talk about some stuff.

3 Right?

4 MR. ZUMMO: Just the exhibits that we were  
10:15 5 discussing at the end of the day Friday.

6 THE COURT: All right. Let me tell the jury we're  
7 here.

8 [At the jury room door] We're here and it will be  
9 about five more minutes.

10:15 10 THE COURT: All right. This is Plaintiff's.  
11 What's your position? What do you got?

12 Be seated, everybody.

13 MR. ZUMMO: In Plaintiff's Exhibit 117, Your Honor,  
14 when we left on Friday we had objected that backup --

10:16 15 THE COURT: Is it 117 or 17?

16 MR. ZUMMO: Defendant's 117.

17 MR. BONHAM: No. 17.

18 MR. STROTHER: I believe it was just 17.

19 MR. ZUMMO: Oh. 17.

10:16 20 THE COURT: I think it's 17.

21 MR. ZUMMO: 17. When we left on Friday we had  
22 raised the objection that we had not been provided any form  
23 of backup information for the bulk of the items on that  
24 exhibit, Your Honor.

10:16 25 Over the weekend, pursuant to the Court's

1 order, Mr. Strother and his client did deliver to us a  
2 series of monthly reports of expenses and monthly summaries  
3 of closings.

4 What I gave Ms. Alexander to give to the Court  
10:16 5 before we started today -- I have marked on that Exhibit 17  
6 in red the particular closings where we still don't have any  
7 support in even the form of a summary-type report, and they  
8 all involve 2017 and 2018 closing dates.

9 THE COURT: All right.

10:17 10 MR. ZUMMO: But I want to tell the Court that.  
11 Because the Court admitted Exhibit 17, pretrial, over our  
12 objection that we thought all backup information needed to  
13 be provided and all they have given us was a summary  
14 report -- I just want to tell the Court that those type of  
10:17 15 summary reports have been provided for the things we were  
16 complaining about on Friday.

17 THE COURT: So, what are you complaining about now?

18 MR. ZUMMO: I'm not complaining, Your Honor. I  
19 wanted to tell the Court that I am assuming that -- since  
10:17 20 the Court admitted it before -- now that they have provided  
21 those summary reports to fill the gaps, that I am assuming  
22 the Court is not going to change its ruling.

23 THE COURT: That's true.

24 MR. ZUMMO: We just want to make sure the record is  
10:18 25 clear that we still believe that they were required to

*Ramani - Direct by Mr. Strother*

1 provide the backup that is behind those summary reports.

2 THE COURT: Is that in the form of an objection to  
3 what exhibit?

4 MR. ZUMMO: Exhibit 17. And it's the same  
10:18 5 objection we made before trial that the Court has already  
6 overruled.

7 THE COURT: Okay. The ruling remains. It's  
8 overruled.

9 All right. Let's call the jury in, please.  
10:18 10 (Jury present)

11 THE COURT: All right. Be seated.

12 Let's get the witness back on the stand,  
13 please.

14 MR. STROTHER: May I proceed, Your Honor?

10:19 15 THE COURT: Yes. Go on.

16 DIRECT EXAMINATION CONTINUED

17 By Mr. Strother:

18 Q. Mr. Ramani, good morning.

19 A. Good morning.

10:19 20 Q. Let's pick up where we left off.

21 I believe one of the things we were talking  
22 about was Urban Living's profit earned from the sale of the  
23 homes that are at issue in this lawsuit.

24 Can you tell the jury what it is Urban Living  
10:19 25 does to earn a profit?

*Ramani - Direct by Mr. Strother*

1 A. I am going to start with -- There's two sides of it, the  
2 buyer's side and the seller's side, meaning if you have a  
3 developer/builder building a home or thinking about building  
4 a home you have to -- or at least what Urban Living does is  
10:20 5 we take them through the consulting process, finding the  
6 land, finding the correct location of that land and then  
7 working through the process of what product and price point  
8 will sell in that location or that market, what the finishes  
9 and details in the home will be, what the actual square  
10:20 10 footage should be, and we walk them through the whole  
11 process from also, then, coming up with the creative  
12 identity for it, the logos, their company name.

13 So, it's an entire process from beginning to  
14 end on the sell side in order to get that home sold.

10:20 15 On the buyer's side I think it fits more into,  
16 you know, we have the showroom that's open seven days a  
17 week, aggressive advertising, which falls on both sides. I  
18 mean getting the seller onboard with us, but then spending a  
19 tremendous amount of money on marketing, print, brochures,  
10:21 20 website, graphics, logos, manpower, staff.

21 I think the key part of what's going to  
22 differentiate us from the majority of what -- you know,  
23 realtors out there is that we have close to 40 to 50  
24 employees on salary that are focused on selling the homes,  
10:21 25 the entire staff from our marketing team to the sales team.

*Ramani - Direct by Mr. Strother*

1                   So, any time if you were out at six o'clock,  
2                   seven o'clock -- The showroom is open from 9:00 to 7:00  
3                   seven days a week. We close about three or four days out of  
4                   an entire year on the key holidays. So, that support staff  
10:22 5                   and sales team and the company is focused on getting the  
6                   customer into our showroom or one of the open houses on  
7                   Saturday and Sunday. Some of the communities are open seven  
8                   days a week.

9                   And, so, the main area of our profits are  
10:22 10                  derived from selling the home and earning those commissions  
11                  through that program.

12                Q. Is having a showroom floor like Urban Living's typical  
13                in the industry?

14                A. No. I was just trying to think if there's anybody else.  
10:22 15                I think Greenwood King, one of the other inner loop  
16                realtors, probably about, I think, eight years ago redid  
17                their offices and then opened a showroom, but it's not  
18                really open to the public on a day-to-day basis where it's  
19                staffed and the realtors are there.

10:22 20                If you look at all these other companies or  
21                the more traditional real estate companies, they do have  
22                offices, but it's -- The idea behind that is most of the  
23                time the realtor is going to meet the customer at the  
24                property.

10:23 25                Our system is set up to where they actually

*Ramani - Direct by Mr. Strother*

1 come to our showroom. I am a big believer on, you know, to  
2 really help somebody buy a house you need to interview them,  
3 sit down and understand what their needs are and by having  
4 the brochures there and having the tools to help the client.  
10:23 5 The buyer or our realtors sit down and get interviewed. We  
6 have conference rooms where the customer can come in and sit  
7 down and sort of go through that process. So, then, when  
8 you take them out, you're helping them save time instead of,  
9 you know, just driving them out and showing them the wrong  
10:23 10 type of house or wrong type of location.

11 So, it's not typical.

12 Q. And do I understand that for your new properties there  
13 are open houses Saturday and Sunday every week?

14 A. Our contracts to our developers/sellers are that every  
10:23 15 single finished home is staffed and open Saturday and Sunday  
16 1:00 to 5:00.

17 Q. Is that normal?

18 A. I mean, I think some realtors try to open their houses,  
19 but usually it will be like 3:00 to 5:00. I mean, it's not  
10:24 20 consistent and it's definitely not every single weekend.

21 Q. Okay. Back to the profit.

22 You testified that Urban Living's commission  
23 is 3 to 6 percent. How is that calculated?

24 A. I can't say it's standard in the industry because it's  
10:24 25 negotiated on every transaction. Sometimes it's 5, but the



*Ramani - Direct by Mr. Strother*

1 average is between 5 to 6 percent, which is the entire gross  
2 commission, but then you have to split that if there's what  
3 they call a "co-op agent".

4 Q. And, to be clear, 5 to 6 percent of what?

10:24 5 A. Of the sales price, the negotiated sales price on the  
6 contract.

7 Q. So I interrupted you about what a co-op deal is.

8 A. A co-op transaction is -- basically, what it means is  
9 you're splitting that transaction with a co-op realtor, an  
10:25 10 outside realtor.

11 So, for example, I mean, if Prudential Gary  
12 Greene brought a client to us we would pay them 3 percent.  
13 Even if it was 5 you would still pay them 3; otherwise, they  
14 wouldn't sell your home. And then we would earn the  
10:25 15 2 or 3 depending if it was at 5 or 6 and then pay our agent  
16 or pay the support staff or the expenses that come out of  
17 that.

18 Q. You testified on Friday, I think, that 1 to 2 percent of  
19 Urban Living's profits would be due to underlying stock  
10:25 20 plans, but I didn't ask you this question.

21 How important are the plans to Urban Living's  
22 profit?

23 A. I mean, inside the loop I don't think -- If you have  
24 looked at product out there, there's only so much you can do  
10:25 25 on these footprints. I think Preston mentioned earlier that

*Ramani - Direct by Mr. Strother*

1 there is a requirement or the City requires it to be  
2 60 percent of that lot size, which is typically a 20-by-40  
3 basis.

4 If you look at the base foundation of a house,  
10:26 5 20 by 20 of it has to go to a garage. So, all that's left  
6 is you can put one bedroom down and then living, dining,  
7 kitchen on the second floor, and then two bedrooms on the  
8 third. Now, there are times where you might only do two  
9 units, and then you have the depth and then you can do  
10:26 10 living, dining room and then three bedrooms on the second  
11 floor.

12 But if you go through -- And I have sold  
13 thousands of these. Okay? And this is not a -- I don't  
14 know what the right word is. I mean, I'm not trying to  
10:26 15 punish any architect, any designer, but there's only so much  
16 you can do to these boxes and -- It's a box and, typically,  
17 you want to try to put three bedrooms and three and a half  
18 baths and a garage in it.

19 So, I -- Look. I mean, that's why we  
10:26 20 negotiated this deal with them. I mean, there's only so  
21 many things you can do. And I don't think it's the  
22 architecture or the plan.

23 And why does so many builders and developers  
24 come to us and why we have so much of the market share?  
10:27 25 It's what we do. It's the showroom. It's the marketing,

*Ramani - Direct by Mr. Strother*

1 location, the land. It's all the other things that come  
2 along with this.

3 And I'm not saying there is not some  
4 importance to it, but it's not significant.

10:27 5 THE COURT: You mean what? The contribution of the  
6 architect?

7 THE WITNESS: Correct, sir.

8 THE COURT: All right. Go on.

9 THE WITNESS: I don't think that's significant.

10:27 10 THE COURT: It's not that significant.

11 All right. Go on.

12 By Mr. Strother:

13 Q. With regard to contribution of the architect, were the  
14 PWA stock plans ever used right out of the box? And let me  
10:27 15 strike that. Let me ask you about the ones in this case.

16 Nagle.

17 A. Okay.

18 Q. How much effort, if you know, had to be put in by a  
19 different architect to make the plans workable?

10:27 20 A. Well, I don't know how much you have gone into the  
21 payment made versus the credit --

22 THE COURT: Hold it. That's not the question.

23 You asked a question. Ask it again, please.

24 I tell you what.

10:27 25 Bruce, can you read it back.

*Ramani - Direct by Mr. Strother*

1 (Question read back by the court reporter)

2 A. A substantial amount.

3 Q. Let me show you Defendant's Exhibit No. 17. Your Honor,  
4 may I please use the laptop screen?

10:28 5 THE COURT: Okay. Is that on? Yeah. There it is.

6 MR. STROTHER: Yes, Your Honor.

7 By Mr. Strother:

8 Q. What three properties appear on Defendant's Exhibit 17?

9 A. I'm sorry. What --

10:28 10 Q. I'm sorry.

11 A. I don't understand the question. I apologize.

12 Q. This lawsuit is about five different projects.

13 A. Correct.

14 Q. So, I would like you to look at Defendant's Exhibit 17  
10:28 15 and tell the jury what information is on there about which  
16 projects.

17 A. Here you have EaDo place, which was referred to as

18 "EaDo" at the beginning, Stanford Street, which was

19 "Stanford", and then Patterson Street.

10:29 20 Q. What does this financial record show?

21 A. The total sales price of each one of those homes in that  
22 community and then the gross commissions and then the close  
23 date.

24 Q. Okay. Would this help the jury calculate sales price  
10:29 25 minus deductible expenses?

*Ramani - Direct by Mr. Strother*

1 A. You will have to scroll down to the bottom because this  
2 is going to reflect the cost or average cost for each month  
3 on what those expenses were towards those commissions, yes.

10:29

4 Q. Can you point the jury to where you're talking about on  
5 this exhibit?

6 A. Yes. Month -- On the bottom, the last box where it  
7 says, "month", "year", "closed homes", "monthly overhead"  
8 and "cost per home".

10:30

9 Q. Okay. And, so, this column over here is the cost per  
10 home of overhead for that particular month?

11 A. Correct.

12 Q. On Friday we saw a spreadsheet about this regarding  
13 Nagle. Is this the same kind of information?

14 A. Correct.

10:30

15 Q. This spreadsheet -- I am going to turn to Page 2 -- it  
16 stops having information around February 17. Can you  
17 explain what that's about?

10:30

18 A. Yes. We were very concerned of providing numbers that  
19 weren't reviewed by our CPA that aren't -- because you have  
20 to put everything coded to the general ledger account  
21 properly.

10:30

22 We haven't closed out '17 and '18 yet; so,  
23 that hasn't been provided. But, again, the averages here  
24 are fairly consistent from Nagle. And, also, in '15 and  
25 '16, they average around 5,700 per house, which is pretty

*Ramani - Direct by Mr. Strother*

1 consistent year after year. We haven't had too much  
2 inconsistency. I think in here you will see it ranges from  
3 5,500 to 6,000 being on the high side.

4 Q. Okay. Let me ask you about the three projects that are  
10:31 5 on this spreadsheet, and they're the ones we put on the  
6 easel on Friday, and you described them as "non-UPM plans".  
7 That's Patterson, Stanford and EaDo.

8 A. Correct.

9 Q. Are you aware that Plaintiff is suing Urban Living for  
10:31 10 altering or removing copyright information regarding those  
11 three projects?

12 A. Yes, I do.

13 Q. Tell me, with regard to the marketing materials, where  
14 did any depictions of what was built come from?

10:31 15 A. Pictures or the plans?

16 Q. Good question.

17 So, if there were photographs on marketing  
18 materials of those three projects, where did those come  
19 from?

10:31 20 A. Our team would go out and take the pictures and then  
21 sometimes the developer would send them to us depending on a  
22 case-by-case basis.

23 Q. Okay. What about any marketing plans?

24 A. Those were provided by the builder or the builder's  
10:32 25 designer/architect.

*Ramani - Direct by Mr. Strother*

1 Q. The architect on those three projects was Bill Wooten.  
2 Right?

3 A. Correct.

4 Q. Did Urban Living ever have anything to do with Bill  
10:32 5 Wooten?

6 A. No, not in a direct basis where we provided them  
7 anything.

8 Q. Once Urban Living received marketing plans from the  
9 builder or Mr. Wooten, did Urban Living alter or remove  
10:32 10 anything from those?

11 A. No.

12 Q. And I guess my question should be more precise.

13 Did Urban Living alter or remove copyright  
14 management information from those marketing plans?

10:32 15 A. No.

16 Q. Do you believe that the builder or Wooten altered or  
17 removed that stuff?

18 A. I wouldn't know.

19 Q. Did you have any reason to believe that they had?

10:32 20 A. No.

21 Q. Was Urban Living in any way involved with the selection  
22 of those plans?

23 A. No. They were brought to us from Aviv and Bill Wooten,  
24 and Aviv was the owner and running that company.

10:33 25 MR. STROTHER: Mr. Ramani, Thank you.

*Ramani - Cross by Mr. Zummo*

1 I pass the witness.

2 MR. ZUMMO: May I proceed, Your Honor?

3 THE COURT: All right. What are you going to need?

4 MR. ZUMMO: We will still need the screen. Sorry.

10:33 5 THE COURT: Okay.

6 CROSS-EXAMINATION

7 By Mr. Zummo:

8 Q. Mr. Ramani, I want to start with the subject that  
9 Mr. Strother asked you about, which is the distributions of  
10:33 10 marketing materials.

11 A. Okay.

12 Q. Did you distribute at Urban Living marketing materials  
13 by sending e-mails to potential customers?

14 A. Yes, we did.

10:33 15 Q. And did you refer to these as "blast e-mails"?

16 A. E-mail blasts. Yes, sir.

17 Q. When you sent --

18 Can we have Exhibit No. 105 please,

19 Plaintiff's Exhibit 105.

10:34 20 Do you recognize the first page of Plaintiff's  
21 Exhibit 105?

22 A. Yes, sir.

23 Q. Is this the first page of a set of marketing materials  
24 that Urban Living would have used for Nagle Park Place?

10:34 25 A. I mean, it's -- I think we created this to provide to



*Ramani - Cross by Mr. Zummo*

1 you. It's the logo.

2 Q. Okay.

3 MR. ZUMMO: Pull up Page 2, please.

4 By Mr. Zummo:

10:34 5 Q. Page 2 of this Urban Living document -- at the top the  
6 title is "E-Mail blast". And is the material that's shown  
7 on this page material that would have gone out in an e-mail  
8 to a list of your customers?

9 A. Yes, sir, it is.

10:34 10 Q. And on this particular e-mail blast, which includes EaDo  
11 Place in the middle and Nagle Park Place at the bottom --  
12 was it your estimate that this went out to between 8,000 and  
13 15,000 individual e-mail recipients?

14 A. Sir, I would have to ask my media team. I'm not sure.

10:35 15 Q. Do you remember giving your deposition in this case?

16 A. I do, sir.

17 Q. Let's do this. I am going to give you a copy of the  
18 condensed copy of your deposition.

19 THE COURT: [To the Witness] You can turn that  
10:36 20 little light on there if you want.

21 By Mr. Zummo:

22 Q. What I am going to be asking about is this part of that  
23 page.

24 A. Okay.

10:36 25 Q. Mr. Ramani, I am offering you this deposition to allow

1 you to look at Pages 79 and 80 through about the fifth line  
2 of Page 80. And, if you read that, tell me if it refreshes  
3 your recollection of what you said at your deposition about  
4 how many were sent out.

10:36 5 A. [Reading] Okay.

6 Q. Does that refresh your recollection that you testified  
7 that somewhere between 8,000 and 15,000 e-mails were sent  
8 out with this particular EaDo place and Nagle Park Place  
9 drawing?

10:36 10 A. Correct. Yes, sir.

11 Q. And can we go back to Page 2 of Exhibit 105.

12 On the EaDo Place drawing there's no mention  
13 of Preston Wood & Associates, is there?

14 A. No, sir.

10:37 15 Q. On the Nagle Park Place drawing there is no mention of  
16 Preston Wood & Associates, is there?

17 A. No, sir.

18 Q. And there is no copyright notice of Preston Wood &  
19 Associates on either the Nagle Park Place drawing or the

10:37 20 EaDo Place drawing?

21 A. Correct.

22 Q. Now, do you send blast e-mails like this out on all of  
23 the properties that you are trying to sell?

24 A. I think we try to. Yes, sir.

10:37 25 Q. So, would you have sent out an e-mail on the Patterson

*Ramani - Cross by Mr. Zummo*

1 Street Landing project?

2 A. I don't know, because I think several -- or the majority  
3 of that development sold out before we actually got to this  
4 point. So, I'm not sure. Again, I'd have to ask media. Or  
10:38 5 if you have supporting documentation. I don't want to  
6 answer that.

7 Q. Well, the only place we got documents is from you.

8 So --

9 A. Right. But, if it's in there, then, yes, we did.

10:38 10 We have a marketing team that does this. So,  
11 I don't know every e-mail blast that goes out. I apologize.

12 Q. Did you send out any e-mails like this on the Stanford  
13 Street Landing project?

14 A. Again, if they were provided, yes. If they're not --

10:38 15 THE COURT: Who would know that if it's not you?

16 THE WITNESS: Sir, we have almost 50 people. We  
17 have a marketing team that does that. So, I'm not involved  
18 in every e-mail blast that goes out, Your Honor. So, I  
19 apologize. I wouldn't know off the top of my head right  
10:38 20 now.

21 If it's not provided here, then it wouldn't  
22 have gone out.

23 THE COURT: Is the sound carrying?

24 MR. ZUMMO: Could you try pulling the microphone a  
10:38 25 little closer.

*Ramani - Cross by Mr. Zummo*

1 THE WITNESS: Yeah. Sure.

2 THE COURT: Yeah, it is.

3 THE WITNESS: If it's not provided in the exhibits,  
4 then I would say "no", because they went through everything  
10:38 5 and provided it to you.

6 But I don't remember every single exhibit and  
7 I haven't gone through every single exhibit. So, I'm sorry  
8 about that.

9 By Mr. Zummo:

10:38 10 Q. But there is no question that at least the EaDo Place  
11 and Nagle Park Place e-mail blast did go out?

12 A. Yes. If they provided you that, it went out, yes, sir.

13 Q. Now, another place that you provide examples, drawings,  
14 that show the properties you have for sale is on the Urban  
10:39 15 Living website. Correct?

16 A. Correct.

17 Q. And on that website --

18 Can we go to Plaintiff's Exhibit 108, please.

19 Is Plaintiff's Exhibit 108 a printout of what  
10:39 20 was, for a time, on your website for Nagle Park Place?

21 A. Yes, it is.

22 MR. ZUMMO: Can you go to Page 2 of the exhibit,  
23 please. I am going to give your rotation skills a workout  
24 on this one.

10:39 25 By Mr. Zummo:

*Ramani - Cross by Mr. Zummo*

1 Q. On Page 2 does that show the footprints and the first  
2 floor site plans for Nagle Park Place?

3 A. Yes, sir, it does.

4 MR. ZUMMO: And then can we go to Page 4, please.

10:40 5 By Mr. Zummo:

6 Q. On Page 4 does it show all three floor plans for Nagle  
7 Park Place?

8 A. I think this is the first phase of that, yes, sir, at  
9 the early stages. Correct.

10:40 10 Q. And is this Nagle Park Place portion of your website  
11 representative of how you present the projects on your  
12 website?

13 A. Sir, could you scroll up, because I don't know if this  
14 is from the brochure or from the website.

10:40 15 If it's all part of that, it would be from the  
16 website, yes.

17 Q. And, typically, on your website what you try to do is  
18 show maybe a photograph of the interior, you show a  
19 representation of what it looks like from the outside and  
10:41 20 you show the floor plans?

21 A. Correct.

22 MR. ZUMMO: Would you please bring up Plaintiff's  
23 Exhibit 113.

24 By Mr. Zummo:

10:41 25 Q. Do you recognize Plaintiff's Exhibit 113 as a Google

*Ramani - Cross by Mr. Zummo*

1 analytics report that Urban Living produced in this lawsuit?

2 A. I don't know if it's from Google, sir. Again, I think  
3 our media provided you that. So, I apologize. I'm not sure  
4 exactly what it is.

10:41 5 Q. You know what a Google analytics report is?

6 A. I do know that, yes.

7 Q. Do you use those in your business?

8 A. I don't, but my marketing team does, yes.

9 Q. In your deposition you explained that Urban Living uses  
10:41 10 them in this --

11 A. Yes.

12 Q. It's my mistake. I meant -- By "you" I was asking about  
13 Urban Living.

14 A. Yes.

10:42 15 Q. And I will try to be more specific.

16 A. Yes.

17 Q. And these Google analytics reports for the time period  
18 that's covered by the report -- Is one of the things that's  
19 reported the total number of times a computer, a remote  
10:42 20 computer, has connected to your website and opened that  
21 page?

22 A. Correct.

23 Q. And is that what's called a "unique page view"?

24 A. If you can zoom in, please, so I can look at it.

10:42 25 Q. Let's look at the first one for Nagle Park Place.

*Ramani - Cross by Mr. Zummo*

1 A. Okay.

2 Q. And we'll pull that up.

3 So, you see on the left-hand side it gives the  
4 actual URL address.

10:42 5 A. Correct.

6 Q. Would that be your website for the Nagle Park Place  
7 page?

8 A. Correct.

9 Q. Then it has properties and then unique page views -- or  
10:42 10 page views and unique page views.

11 And you understand the difference between a  
12 "page view" and a "unique page view"?

13 A. I think so. Yes, sir.

14 Q. And a "unique page view" means that for one day a  
10:43 15 computer with a specific address opened that page. It may  
16 have looked at it several times, which is why there's more  
17 page views?

18 A. Correct, sir.

19 Q. So, as far as whether a computer, for example, at  
10:43 20 somebody's house is connecting to your website and getting  
21 images from your website of this Nagle Park Place page, the  
22 unique page views tells us that that was 8,578 times for the  
23 time period on this report?

24 A. Yes, sir.

10:43 25 Q. And let's go to the next entry on this report, which is

*Ramani - Cross by Mr. Zummo*

1 still Plaintiff's Exhibit 113, and this would be the page  
2 that for some time Urban Living showed Patterson Street  
3 Landing. Correct?

4 A. Yes, sir.

10:44 5 Q. And how many unique page views were shown during that  
6 period of time?

7 A. 3,752.

8 Q. And let's go to the third entry.

9 Is this the Google analytics report for the  
10:44 10 Urban Living website for the page that showed EaDo Place?

11 A. Yes, sir.

12 Q. And how many unique page views were there for EaDo  
13 Place?

14 A. 7,087.

10:44 15 Q. 7,087?

16 A. Yes, sir.

17 Q. And let's go to the next one, please.

18 Now, is this the Google analytics report for  
19 the Urban Living website web page that for a time showed  
10:45 20 Stanford Street Landing?

21 A. Yes, sir.

22 Q. And how many unique page views were there for Stanford  
23 Street Landing?

24 A. 439.

10:45 25 Q. 439?



*Ramani - Cross by Mr. Zummo*

1 A. Yes, sir.

2 Q. Thank you.

3 On any of the Urban Living pages for those  
4 four projects -- Nagle, Patterson Street, EaDo, Stanford  
10:45 5 Street Landing -- was there any mention of Preston Wood &  
6 Associates?

7 A. No.

8 Q. Were there any copyright notices of Preston Wood &  
9 Associates?

10:45 10 A. No.

11 Q. The next thing I'd like to do, Mr. Ramani, is talk to  
12 you, I hope briefly, about some aspects of the accounting  
13 records that you discussed with Mr. Strother.

14 A. Okay.

10:46 15 Q. Now, the Exhibit 17 that was on the screen right before  
16 I started asking you questions -- did you personally prepare  
17 that exhibit?

18 A. No. Our accountant/bookkeeper did.

19 Q. And did you do the calculations at the bottom of the  
10:46 20 page to do the average overhead cost per closing that you  
21 had summarized at the bottom of the page and at the top of  
22 Page 2?

23 A. I did some of them with her at the beginning, yes.

24 Q. Did you do all of them or was it a shared effort?

10:46 25 A. Shared effort.

*Ramani - Cross by Mr. Zummo*

1 Q. Now, Exhibit 17 was -- I believe --

2 Can we put up Exhibit 17, please.

3 Do you recall when this exhibit was  
4 actually -- this particular printout was prepared?

10:47 5 A. I don't know exactly right now, but it was somewhere  
6 when you had sent the questions over to our attorney  
7 requesting this type of supporting documentation.

8 Q. So, you prepared it for the purpose of preparing  
9 information in this lawsuit?

10:47 10 A. Yes. Correct.

11 Q. It was not a record that was created back at the time  
12 that these closings were taking place?

13 A. Sir, the top half is because, on a monthly and weekly  
14 basis, I go through our reports to see where the company is  
10:47 15 on revenue and also sales.

16 And then the expenses -- they're not broken  
17 out on average like this, but the monthly overhead on those  
18 expenses I review on a weekly and monthly basis.

19 Q. I'm not sure you understand my question.

10:48 20 This particular page was not prepared and  
21 printed back at the time the closings took place?

22 A. No.

23 Q. Now, the -- what bookkeeping software or system do you  
24 use at Urban Living?

10:48 25 A. Quicken.

*Ramani - Cross by Mr. Zummo*

1 Q. Quicken. The Quicken program that you use, does it do  
2 what's called "lock the books" at any point in time?

3 A. Correct. When we close out the end of the year we  
4 typically try to -- I have to ask my CPA that question, but  
10:48 5 I think you asked me in the deposition. I don't know for  
6 sure, but I think, particularly, what ends up having is at  
7 the end of the year it gets locked.

8 Q. And you gave your deposition in April of this year?

9 A. I don't remember the exact time frame.

10:48 10 THE COURT: What's the date?

11 By Mr. Zummo:

12 Q. If you look at the -- that's in front of you, that  
13 deposition was April 12. Correct?

14 A. Yes.

10:49 15 Q. When you gave your deposition on April 12 you were not  
16 sure whether the books were ever locked. Correct?

17 A. Right. Because I didn't know what years were closed out  
18 and what were still open.

19 Q. And, in fact, what -- And "locking the books" means  
10:49 20 you -- for that accounting period no one can go back in and  
21 make revisions and changes anymore?

22 A. Yes.

23 Q. And you told us in your deposition, didn't you, that  
24 you, in fact, knew that, since this lawsuit was filed, some  
10:49 25 revisions had been made?

*Ramani - Cross by Mr. Zummo*

1 A. Yes, sir. If there's mistakes made or something is not  
2 posted accurately, we do go back in and correct it, yes.

3 Q. So, at least the books for the time periods when these  
4 closings took place had not been locked as of the time this  
10:49 5 lawsuit was filed?

6 A. Sir, I still don't know that.

7 MR. ZUMMO: Can we look at Defendant's Exhibit 1,  
8 please. And can you expand the top so we can see the --  
9 That's good. Thank you.

10:50 10 By Mr. Zummo:

11 Q. Now, Defendant's Exhibit 1 is a list of closings with  
12 some information about the sales of six units at Nagle  
13 Street. Correct?

14 A. Yes, sir.

10:50 15 Q. And what I want to ask you about is the concept of a  
16 direct cost. And I believe you have explained that you had  
17 individuals that were called "transaction coordinators" at  
18 Urban Living.

19 A. Correct, sir.

10:50 20 Q. And those transaction coordinators got a portion of the  
21 commission directly paid to them?

22 A. \$50, sir, and a salary.

23 Q. So, is the difference between the gross commission and  
24 the net commission on this Exhibit 1 the amount that's paid  
10:51 25 to those transaction coordinators?

*Ramani - Cross by Mr. Zummo*

1 A. No. There's multiple pieces of that.

2 As I said earlier, there is a developer  
3 consultant that would come out of that portion, and I think  
4 the 50 is out of that portion. I would have to do the math  
10:51 5 and look at the checks that you have there. Or the general  
6 ledger we could look at and back into it.

7 Q. So, let me back up. I will try to ask the question more  
8 generally.

9 Is the difference between gross commission and  
10:51 10 net commission what you at Urban Living considered to be the  
11 direct expenses that are paid to individuals who assisted  
12 with the sales?

13 A. No. I see all of these expenses somewhat related -- I  
14 mean, our business is all sales. So, the showroom, the  
10:51 15 brochures, the media, the staff -- everything is directly  
16 related to these sales.

17 Q. Let me -- What I am trying to do is see if you make a  
18 distinction between direct expense and overhead.

19 A. I think we were asked to provide it that way. But I  
10:52 20 don't know. I think all the sales, expenses in our  
21 company -- everything is based on sales. The whole company.  
22 We don't have any part of the company that is not there  
23 focused on selling.

24 Q. Let's look at some information that you provided. It's  
10:52 25 Defendant's Exhibit 16.

*Ramani - Cross by Mr. Zummo*

1 A. Okay.

2 Q. Now, Exhibit 16 starts with the same page that we just  
3 looked at. Correct?

4 A. Okay. Yes, sir.

10:52 5 MR. ZUMMO: Can we go to Page 2, please.

6 By Mr. Zummo:

7 Q. Now, do you recognize what starts on Page 2 of  
8 Exhibit 16 as a report from your Quicken program for all of  
9 Urban Living's expenses for the month of December 2016?

10:52 10 A. Sir, if you could please zoom in. I can't -- I mean, I  
11 know it's a general ledger report, but I don't know what's  
12 there.

13 Q. What I may be able to do, Mr. Ramani, is give you a copy  
14 of that. That might be helpful to you.

10:53 15 A. Thank you.

16 Q. Do you recognize Defendant's Exhibit 16, starting on  
17 Page 2, as a report of all of your company's expenses for  
18 the month of December 2016?

19 A. Yes.

10:53 20 Q. And the way it's organized you have expense codes and  
21 they're presented in the order of those codes?

22 A. Yes, sir.

23 Q. And the codes go along with particular categories of  
24 expenses?

10:53 25 A. Chart of accounts. Yes, sir.

*Ramani - Cross by Mr. Zummo*

1 Q. So, I would like you just to look on -- I think it's the  
2 page you're looking at, Page 2 of Exhibit 16 -- the  
3 automobile expense.

4 A. Okay.

10:53 5 Q. And I just have some general questions about this to  
6 give an example for the Court and jury for how this works.

7 A. Okay.

8 Q. Now, you use automobiles -- you have some automobiles  
9 that Urban Living leases. Correct?

10:54 10 A. Yes, sir.

11 Q. And your employees use those to get around to the  
12 different properties for various business purposes?

13 A. To put the brochures out --

14 THE COURT: Could you speak up, sir, please.

10:54 15 A. Sorry, Your Honor.

16 "Yes."

17 Q. So, are you able to tell us whether any of the  
18 automobile expenses shown on the December 2016 report  
19 actually was used for the sales of the six units at Nagle  
10:54 20 Park Place?

21 A. Yes, sir.

22 Q. So, do you keep records for your auto expense of going  
23 out to that location?

24 A. They have a weekly log and a binder and a spreadsheet  
10:54 25 that they go from property to property at least two to three

*Ramani - Cross by Mr. Zummo*

1 times a week to check the signs, to check the banners, to  
2 check the brochures.

3 So, yes. I mean, they do have a system that  
4 they have to follow to maintain every single one of these  
10:55 5 properties. It's a standard operating procedure that we  
6 have on a weekly basis.

7 Q. But those logs were not produced in this lawsuit, were  
8 they?

9 A. I don't know, sir.

10:55 10 THE COURT: Well, who would know?

11 THE WITNESS: The attorney, sir. I don't know. I  
12 apologize. There's a lot of exhibits, Your Honor. I don't  
13 know if every single thing was provided or they asked for  
14 that.

10:55 15 But there is an average if you take --

16 THE COURT: Go on. Next question.

17 THE WITNESS: Okay.

18 By Mr. Zummo:

19 Q. Now, did you -- so we're clear: Did you personally  
10:55 20 produce the report that's Exhibit 16?

21 A. No. My bookkeeper did.

22 Q. And you don't know the specific steps your bookkeeper  
23 took to produce that report?

24 A. Yes, sir. I run the reports out of Quicken, too. I  
10:55 25 mean, you export it, you print it and you provide it. I



Ramani - Cross by Mr. Zummo

1 mean, it's not very difficult.

2 Q. Do you know whether or not your bookkeeper went and  
3 looked at every log of every vehicle when your bookkeeper  
4 presented this report?

10:56 5 A. I mean, she's very detailed and accurate. So, I don't  
6 know what she did behind the scenes, sir, but the reports  
7 that we provided you are accurate.

8 MR. ZUMMO: Objection. Nonresponsive, Your Honor.

9 THE COURT: Sustained.

10:56 10 By Mr. Zummo:

11 Q. Do you know if your --

12 A. I --

13 Q. -- bookkeeper checked the vehicle logs when your  
14 bookkeeper produced Exhibit 16?

10:56 15 A. I don't know, sir.

16 Q. Would the expenses for automobile expense on Exhibit 16  
17 have been incurred whether or not you sold the six units at  
18 Nagle Park Place?

19 A. Yes, sir.

10:56 20 Q. And I want to go to another example of some of these  
21 expenses and ask you the same kinds of questions. I just  
22 want to pick a couple of these to talk about.

23 Can you turn to the next page, and it's code  
24 number, I believe, 5260 -- or 6260.

10:57 25 A. I am having a really hard time seeing this, but, if you

*Ramani - Cross by Mr. Zummo*

1 ask me, I will try to back into it. I apologize.

2 Q. If you can look up on the screen and see if you can find  
3 that on the page and tell me which one you would rather work  
4 from.

10:57 5 A. This one is clear. Thank you.

6 Q. The legal fees that are shown on here --

7 A. Yes, sir.

8 Q. -- according to your Quicken report, these are legal  
9 fees that were spent in December 2016. Correct?

10:57 10 A. Yes, sir.

11 Q. Did -- And each of these entries refers to a different  
12 legal matter. Correct?

13 A. Yes, sir.

14 Q. Is it your position that all of these legal fees were  
10:57 15 incurred to assist in the marketing or sale of the Nagle,  
16 Patterson Street, EaDo or Stanford Street houses?

17 A. I think the Aspire, the FSLA, the PWA -- those correlate  
18 with sales related, lending issues that are averaged.

19 Legion and Legend would not be directly related on sales.

10:58 20 Q. And the total legal fees -- you may have to refer to the  
21 written copy -- the total legal fees were \$9,580.50?

22 A. \$9,680. Yes, sir.

23 Q. And that includes \$4,049.50 for the PWA entry?

24 A. Yes, sir.

10:58 25 Q. That's this lawsuit. Correct?

Ramani - Cross by Mr. Zummo

1 A. I think so. Yes, sir.

2 Q. So, you think that you're entitled to deduct the legal  
3 fees spent in defending this lawsuit as a cost in reaching  
4 the net profits for purposes of recovery in this case?

10:59 5 A. Sir, we were asked to provide all our expenses and --

6 THE COURT: Hold it. That's not answering the  
7 question.

8 A. Yes, I do.

9 Sorry, Your Honor.

10:59 10 Q. And, as far as you're concerned, these legal fees  
11 represent a cost of doing your business?

12 A. Yes. On average, it does.

13 Q. Then the last one I want to ask about is on -- it would  
14 be Page 5 of the exhibit that's in front of you, and the  
10:59 15 code -- the whole category is "Travel and Entertainment".

16 A. Yes, sir.

17 Q. This also includes meals?

18 A. Yes, sir.

19 Q. And is it true that your printout, the report,  
10:59 20 Exhibit 16, has entries for meals for just about every day  
21 of December?

22 A. Yes, sir.

23 Q. They're La Madeleine, H.E.B., Pinkberry, Starbucks,  
24 Whataburger.

11:00 25 A. Right.

*Ramani - Cross by Mr. Zummo*

1 Q. The total travel meals and entertainment expenses for  
2 that month were \$27,378?

3 A. Correct, sir.

4 Q. And it is your position in this case that that \$27,378  
11:00 5 is a proper deduction from your revenues to calculate the  
6 net profits in this case?

7 A. Yes, sir. That's all for the staff, gifts for the  
8 awards for their sales and also lunches and things that we  
9 buy for our team every day. Yes. We do it all the time.

11:00 10 Q. And are you saying that all of these daily meal  
11 expenses, the travel expenses, the gifts that are the last  
12 three entries on here directly assisted in the marketing or  
13 sale of the Nagle, Patterson Street, EaDo and Stanford  
14 Street houses?

11:01 15 A. A prorated portion of it, yes. We're not allocating all  
16 of it, but if you divide it by the total amount of  
17 transactions and if you go back up and read the detailed  
18 descriptions it does show that, that it's correlated  
19 directly to sales.

11:01 20 Q. Would you have incurred all of these 27,000 dollars'  
21 worth of expenses if you hadn't sold a single unit at Nagle,  
22 Patterson, EaDo or Stanford Street?

23 A. It would be a prorated less amount, yes, because if we  
24 don't have the sales staff, the teams, the things going  
11:01 25 on -- So, they do correlate directly to the sales of those

*Ramani - Cross by Mr. Zummo*

1 properties, yes, sir. A portion of it does, yes, sir.

2 That's why we averaged it this way.

3 In fact, there's certain things we took out  
4 that didn't correlate directly to it. That's why I think we  
11:01 5 did the advertising a little different.

6 But it's very detailed, yes.

7 Q. Well, let's look at how you allocated it.

8 Can we go back to Defendant's 17, please.

9 And, in particular, I'd like to look at the  
11:02 10 box at the bottom, the graph.

11 A. Sure. I think, if you're going to dial this in, you  
12 should go up because that report directly correlated to the  
13 Nagle one. So, we should go back to the spreadsheet from  
14 Nagle. That supports that information.

11:02 15 Q. Well, let's -- I will do that for you. I am going to  
16 agree with you. Let's go back to Exhibit 16 and Page 1.

17 Is this what you're looking for?

18 A. Yes, sir.

19 Q. So, let's go to the top.

11:02 20 And, Mr. Ramani, just so -- I think  
21 Mr. Strother covered this with you -- but what you did to  
22 get this net income from the net commission is you  
23 subtracted something called "operating costs" and not  
24 including advertisements?

11:03 25 A. Correct.

*Ramani - Cross by Mr. Zummo*

1 Q. And this number for the units that were sold in 2016,  
2 it's the same number for each one. Right?

3 A. It's an average. Correct.

4 Q. And I was going to ask that. It's the same number  
11:03 5 because it's an average for the whole month?

6 A. Correct.

7 Q. And you reached that average -- you calculated it by  
8 taking the total expenses from Exhibit 16, which were  
9 \$237,000, and dividing by the number of closings in  
11:03 10 December 2016?

11 A. Correct.

12 Q. And when whoever did that calculation did it, the number  
13 turned out to be \$6,077 per closing?

14 A. Yes, sir.

11:03 15 Q. So, now I'd like to go back to Exhibit 17. And, again,  
16 I want to look at the bottom of the page.

17 Did you do the same process to come up with  
18 costs per home for each month that's summarized on  
19 Exhibit 17?

11:04 20 A. Yes, we did, sir.

21 Q. So, in other words, you took for this line -- the first  
22 line which goes with October 2015, you divided \$81,529 by  
23 33 closings and got to \$5,500. Correct?

24 A. Correct, sir.

11:04 25 Q. And, as we said earlier, either you or your accountant/

*Ramani - Cross by Mr. Zummo*

1 bookkeeper did that division?

2 A. Yes, sir.

3 Q. And you believe it's correct and reliable?

4 A. Sir, I mean, I haven't actually personally divided all

11:04 5 of these out. She used Excel and a formula; so, I am going  
6 to assume they are correct. But if there are some that are  
7 off I apologize, but they should all be accurate.

8 MR. ZUMMO: Your Honor, I want to work with this  
9 pad for one of these calculations for a couple of them. Can  
11:05 10 the Court -- How does the Court want to position it?

11 THE COURT: Say again.

12 MR. ZUMMO: Can everybody see the pad?

13 THE COURT: Just ask the jury. I can.

14 Can everybody see it?

11:05 15 (Jurors indicate affirmatively)

16 THE COURT: All right.

17 By Mr. Zummo:

18 Q. Mr. Ramani, I want to ask you about this third entry.

19 A. Okay.

11:05 20 Q. So, to do the math:

21 It was \$225,010 for the total overhead  
22 expenses for that month?

23 A. Right.

24 Q. And divided by 38 closings?

11:05 25 A. Okay.

*Ramani - Cross by Mr. Zummo*

1 Q. Do you want to do it long division here or do you want  
2 to use your phone or --

3 A. I don't have my phone with me.

4 Q. The 38 is going to go into 225 how many times?

11:06 5 A. I'd rather just use a calculator. Can we just get a  
6 calculator real quick? There's no need to go through all  
7 this and bore them.

8 THE COURT: Mr. Zummo, come up. Grab this  
9 [calculator].

11:06 10 MR. ZUMMO: Thank you, Your Honor [hands calculator  
11 to the witness].

12 THE WITNESS: Okay.

13 By Mr. Zummo:

14 Q. What's the result?

11:06 15 A. 5,921.

16 Q. What's the result that's shown on Line 3 of Exhibit 17?

17 A. 1,618.

18 Q. You're showing a cost per home of \$900 more than what  
19 the actual average is?

11:06 20 A. It does show that. Yes, sir.

21 Q. Let's go to page -- the next page. Mr. Ramani --

22 MR. ZUMMO: Your Honor, could we turn the lights  
23 down just long enough to see that page.

24 By Mr. Zummo:

11:07 25 Q. The very top line, which reports 42 closings and an



*Ramani - Cross by Mr. Zummo*

1 average of \$6,566 per closing -- Can you divide the \$216,692  
2 by 42?

3 A. Yes, sir.

4 Q. What do you get?

11:07 5 A. 5,159.

6 Q. So, the calculator that you just used had \$5,159, but  
7 your exhibit says \$6,566. Correct?

8 A. Correct, sir.

9 Q. Can we agree that at least some of the numbers on  
11:08 10 Exhibit 17 are not accurate?

11 A. Yes, sir. I agree.

12 Q. Now, another thing I'd like to talk about, sir, is the  
13 idea of which expenses produced which income.

14 A. Okay.

11:08 15 Q. What you did, in attempting to come up with an average  
16 expense to deduct from your commissions, was take all of the  
17 expenses for a given month and divide by the total closings  
18 for that given month?

19 A. We did it that way and we also, I think, did it on an  
11:08 20 annual basis.

21 Q. What you have presented in the courtroom is the one  
22 that's monthly. Correct?

23 A. I was under the impression -- Okay. I'm sorry. I know  
24 what we did. We took all the months and then divided that  
11:09 25 on an average and it came out to 5,750.

*Ramani - Cross by Mr. Zummo*

1 Q. But we don't have that calculation anywhere in evidence,  
2 do we?

3 A. I think we do. I'm not sure.

4 Q. We don't have any documents that show all of your  
11:09 5 closings and all of your expenses, do we?

6 A. I think if you take all of the information that was  
7 provided and all the months below --

8 THE COURT: Hold it. The answer is "yes" or "no".

9 THE WITNESS: "Yes."

11:09 10 THE COURT: By the way, if you can't answer it  
11 "yes" or "no" just say so.

12 He said, "Yes". Go on.

13 THE WITNESS: "Yes."

14 By Mr. Zummo:

11:09 15 Q. Well, I will leave it to your counsel to show where that  
16 information was presented.

17 A. If you take those spread --

18 Q. No.

19 A. Sorry.

11:09 20 Q. And the way you have done it on Exhibit 17, you took all  
21 expenses for a given month and divided that by all closings  
22 for that month?

23 A. Correct.

24 Q. Now, in your business, the marketing efforts that lead  
11:09 25 up to a sale and a closing and a commission actually take

*Ramani - Cross by Mr. Zummo*

1 place before the closing. Right?

2 A. No.

3 Q. I will try to be clearer.

4 Do you do the marketing work before the sale?

11:10 5 A. No. I mean, we're --

6 Q. For a particular house.

7 A. No. The marketing continues -- There are multiple units  
8 in that development. So, no. The marketing continues even  
9 after the sale of the house.

11:10 10 Q. But to get a commission on a sale of one specific house  
11 the marketing that results in that sale is going to happen  
12 before the closing on that house. Right?

13 A. No. We don't actually just market the one house. We're  
14 marketing a community. So, no, the marketing continues on  
11:10 15 that development and it sometimes can go even after.

16 I mean -- And then you said overhead, too.

17 But we have to deal with the customer, the warranty. It  
18 goes on for years. I mean, we have sometimes customers that  
19 call us three years after the house closes.

11:11 20 Q. I think I can work with the way you're trying to answer  
21 my question.

22 A. Okay.

23 Q. When closings happen, for example, in December 2016 --

24 A. Okay.

11:11 25 Q. -- they produce commissions that you earn and get paid

*Ramani - Cross by Mr. Zummo*

1 in December of 2016?

2 A. Correct.

3 Q. But the expenses and the marketing efforts that were  
4 involved in creating those sales and earning those  
11:11 5 commissions didn't all happen in December 2016?

6 A. Some of them do. Some of them roll over into the next  
7 month also, sir, because -- I am trying to answer this as  
8 accurately as I can.

9 If you get an invoice for advertising and you  
11:11 10 advertise every single month, some of it could carry over to  
11 the month before. Some of them are paid three months in  
12 advance. So, it's an average.

13 Q. And some of them could happen before the month where the  
14 closings happen?

11:12 15 A. Yes, sir. Yes. Definitely.

16 Q. And, so, your method is not one that specifically  
17 matches the revenues in a month with the expenses that  
18 created those revenues?

19 A. I don't agree with that. I think it's pretty accurate,  
11:12 20 sir. We have been very detailed to provide you everything  
21 we can to give you an accurate number on what those expenses  
22 are. So, no, I don't agree with your statement.

23 Q. We don't have any calculation in any exhibit that you  
24 have presented to us that shows any expenses outside of the  
11:12 25 month when the commissions occurred. Does it?

*Ramani - Cross by Mr. Zummo*

1 A. Sir, we provided you hundreds and hundreds of pages.

2 Yes, you do have supporting --

3 THE COURT: No. The answer is "yes" or "no".

4 THE WITNESS: "Yes."

11:12 5 THE COURT: Yeah. I don't mean to jump in, but if  
6 you can't answer a question "yes" or "no" let me know or the  
7 attorney know. He's going to have to rephrase it or move  
8 on.

9 A. Okay. I would think, with all the general ledger stuff,  
11:13 10 yes, you do have it.

11 Q. Where is the calculation in an exhibit that you have  
12 presented in this lawsuit in this courtroom?

13 A. I don't understand the question. I apologize.

14 Q. The last thing I want to talk about is an e-mail that we  
11:13 15 have seen before in this case. It was Plaintiff's  
16 Exhibit 103.

17 Now, you remember -- I believe you talked  
18 about this e-mail on Friday.

19 A. Correct.

11:13 20 Q. And did you tell us on Friday that the statement that  
21 "Mr. Cameron ended up having to draw a plan from scratch;  
22 so, we didn't even use this plan" was not accurate?

23 A. Yes, sir.

24 Q. Now, do you remember being asked about whether the  
11:14 25 Cameron Nagle Street design was done from scratch in your

1 deposition?

2 A. I do. Yes, sir.

3 Q. Can we go to Page 37, please.

4 And do you see at Line 4 I asked you: "So, is  
11:14 5 it still your affidavit testimony that Mr. Cameron prepared  
6 the design shown in Exhibit 5 from scratch?"

7 And what was your answer?

8 A. "Yes," sir.

9 Q. And then I asked: "What do you mean when you use the  
11:15 10 term 'from scratch'?"

11 And your answer was what?

12 A. "That he went to CAD and designed it himself."

13 Q. And my next question was: "With absolutely no use of a  
14 prior design from Preston Wood?"

11:15 15 And what did you say?

16 A. "Correct."

17 Q. And my next question was: "And that is your sworn  
18 testimony today?"

19 A. "Yes." Correct.

11:15 20 Q. And the "today" was April 12, 2018. Correct?

21 A. Correct.

22 Q. And then down at Line 22 I asked: "Even though you can  
23 acknowledge that the Preston Wood title block and Preston  
24 Wood copyright notice are on what Mr. Cameron claims to be  
11:15 25 his design for the Nagle Street townhouse, Exhibit 5?"

*Ramani - Cross by Mr. Zummo*

1 And what was your answer?

2 A. "Yes."

3 MR. ZUMMO: Can we go back to the e-mail, please.

4 By Mr. Zummo:

11:16 5 Q. You were copied on this e-mail from Fina Reisinger; are  
6 you not?

7 A. Yes, sir, I was.

8 Q. Mr. Cameron was copied on this e-mail from Fina  
9 Reisinger, wasn't he?

11:16 10 A. Yes, he was.

11 Q. But between the date of this e-mail, May 5th, 2014,  
12 until Friday last week, you never told Sam Wood or Preston  
13 Wood that it wasn't accurate that "Mr. Cameron ended up  
14 having to draw a plan from scratch; so, we didn't even use  
11:16 15 this plan"?

16 A. I haven't been able to speak to them directly for a long  
17 time. So, you are correct on that.

18 Q. In fact, you didn't do it before this lawsuit was filed?

19 A. At that time, sir, and over and over I was told that it  
11:16 20 was drawn from scratch. And when we did all the research,  
21 all the overlays, it showed that it was a completely  
22 different plan. So, I assumed that at that time, yes.

23 Q. Mr. Cameron saw this e-mail, but he didn't do anything,  
24 to your knowledge, to correct the false statement that the  
11:17 25 plan ended up having to be drawn from scratch and he didn't

*Ramani - Cross by Mr. Zummo*

1 even use this plan?

2 A. I agree, sir, yes. It was a mistake.

3 Q. And you never asked Mr. Cameron to make that correction,  
4 did you?

11:17 5 A. Yes, I did. That's why we all sat down and decided and  
6 talked to the builder about redesigning the rest of the  
7 units; because it was a mistake that was made. Yes, I did.

8 Q. I mean the correction of the false statement in this  
9 e-mail.

11:17 10 A. Sir, at that time I didn't think it was false.

11 And I had a conversation with Sam asking for  
12 the credit, also, based on this e-mail and what I was told,  
13 and she did accept the credit.

14 It was a mistake made and I apologize.

11:17 15 Q. When did you decide -- when did you realize that this  
16 May 5th, 2014, e-mail was false?

17 A. I think after the lawsuit was filed. We started  
18 realizing it after April.

19 Q. The lawsuit was filed in 2016. Correct?

11:18 20 A. It was, sir, but I was under the impression that it was  
21 still from scratch. Even in my deposition at that point I  
22 thought that he had drawn it. I was told it was drawn from  
23 scratch. And I think he also thought it was drawn from  
24 scratch.

11:18 25 Q. And sometime between April 12 and Friday, August 24, you



*Ramani - Cross by Mr. Zummo*

1 decided that this May 5th e-mail was false?

2 A. No. You're plugging -- I never said that, and I am not  
3 going to let you trick me into answering that. I never said  
4 that. I never said Friday, August 24. So, you're wrong,  
11:18 5 sir.

6 Q. I am talking about last Friday, the first time you have  
7 ever said that this e-mail was --

8 A. No, sir. You don't know what I said to my attorney and  
9 Cameron. So, you're false and making up stuff again.

11:18 10 You're not going to trick me into answering that.

11 Q. You --

12 A. No. Wrong.

13 Q. When was it between --

14 A. I don't know the exact date --

11:19 15 THE COURT: Hold it a second. One question at a  
16 time.

17 By Mr. Zummo:

18 Q. When was it between your sworn deposition testimony on  
19 April 12, 2018, and last Friday that you decided this e-mail  
11:19 20 was false?

21 A. I would think a little bit after the deposition was  
22 taken. I don't know the exact date, sir.

23 Q. You had the opportunity to read and sign your  
24 deposition, didn't you?

11:19 25 A. Yes, sir.

*Ramani - Cross by Mr. Zummo*

1 Q. And that included a chance to make corrections if  
2 anything was stated incorrectly?

3 A. Correct. So, that would be a good time to look at that  
4 date, when I signed it, and then we'll be able to match up  
11:19 5 exactly when I probably made that decision.

6 Q. Well, you never made a correction to the deposition, did  
7 you?

8 A. I don't know, sir. My attorney handles that. So, I  
9 apologize.

11:19 10 THE COURT: Wait a second. You never made any  
11 correction to the deposition?

12 THE WITNESS: I don't know, sir. I don't think  
13 there was any updates or changes that needed to be made to  
14 it, Your Honor.

11:20 15 THE COURT: All right. Go on.

16 By Mr. Zummo:

17 Q. When you testified on Friday that this whole thing is  
18 just a big misunderstanding -- Do you think you might have  
19 fewer misunderstandings if you didn't wait more than four  
11:20 20 years to tell Preston Wood and Sam Wood that this e-mail  
21 that you sent that said "We aren't going to use your  
22 design" --

23 A. Yes. If you weren't involved, then you would have let  
24 me speak to them. I tried to call them and text them  
11:20 25 multiple times, yes. This is about greed from your side.

*Ramani - Redirect by Mr. Strother*

1 So, yes, I do. I tried to text her.

2 MR. ZUMMO: Your Honor, no further questions.

3 A. I tried to reach out to her and I tried to apologize.

4 THE COURT: Pardon me?

11:20 5 MR. ZUMMO: No further questions.

6 MR. STROTHER: Your Honor, I do have a brief  
7 redirect.

8 THE COURT: Sure go on.

9 REDIRECT EXAMINATION

11:20 10 By Mr. Strother:

11 Q. Mr. Ramani, let me first draw your attention back to  
12 accounting to Defendant's Exhibit 17.

13 A. Okay.

14 MR. STROTHER: Your Honor, may I please have the  
11:20 15 laptop screen.

16 THE COURT: All right. Do you want your --

17 MR. STROTHER: Yes, Your Honor.

18 THE COURT: Hang on one second.

19 MR. STROTHER: Thank you.

11:21 20 By Mr. Strother:

21 Q. Mr. Zummo pointed out an error in Defendant's Exhibit 17  
22 that I wanted to ask you about.

23 Thank you for your patience while I find it  
24 here.

11:22 25 I am going to use my laser pointer to ask you

*Ramani - Redirect by Mr. Strother*

1 about the portion at the bottom of Defendant's Exhibit 17.

2 A. Okay.

3 Q. Is the cost per home, over here in this column, supposed  
4 to be monthly overhead divided by closed homes in that  
11:22 5 month?

6 A. It should be. Yes, sir.

7 Q. I'd like you to pull out a calculator.

8 A. All right.

9 Q. Divide \$162,475 --

11:22 10 A. Okay.

11 Q. -- by 33.

12 A. That should be 25.

13 Q. Tell me what that number is.

14 A. Wait. It should be 25.

11:22 15 Q. I know. Divide it by 33 and tell me what that number  
16 is.

17 A. 4,923.

18 Q. Now divide \$225,010 by 33.

19 A. Right.

11:22 20 Q. What's that number?

21 A. 6,818.

22 Q. Okay. Now divide \$162,475 by the correct number, the  
23 number 25.

24 A. 6,499.

11:23 25 Q. 6,499 instead of 4,923?

*Ramani - Redirect by Mr. Strother*

1 A. We did a line item error. Sorry.

2 Q. So, in that case, the number in this column is lower.

3 But would you do the calculation for 225.

4 What is \$225,010 divided by 38?

11:23 5 A. 5,921.

6 Q. That is lower. Correct?

7 A. Yes.

8 Q. So, whenever the homes that should be divided from are  
9 lower than 33 the cost per home would go up, and whenever

11:23 10 it's higher than 33 the cost will go down. Correct?

11 A. Right.

12 Q. Were you aware of that error before you took the stand  
13 today?

14 A. No. I did not. And I apologize for that.

11:24 15 Q. Regarding the meals that appear in your monthly  
16 overhead, why do you believe that that is a proper  
17 deduction?

18 A. The meals are all related to the sales staff and the  
19 team, again, because we have our showroom and they come in  
11:24 20 pretty much seven days a week. We try to provide benefits  
21 to them and incentives for them to be at the showroom. So,  
22 we will buy them Starbucks or buy them lunch.

23 We do things for our team to back into the  
24 sales. So, that's why it's calculated that way. And  
11:24 25 they're all line-itemed and very detailed to show that.

*Ramani - Redirect by Mr. Strother*

1 Q. Are those meals that are provided, essentially, on the  
2 showroom for the various employees and independent  
3 contractors?

4 A. The majority of them are. Or if a builder was taken out  
11:24 5 to lunch or dinner, then some of that would take place also.

6 Q. Just a couple of quick more questions.

7 You were asked about e-mail blasts.

8 Am I correct in my understanding that an  
9 e-mail blast is a one-time e-mail sent; essentially press a  
11:25 10 button and it goes to a bunch of people?

11 A. Correct.

12 Q. It's not a few hundred e-mails sent out individually?

13 A. Correct.

14 Q. And, finally, I'd like you to look at Plaintiff's

11:25 15 Exhibit 13. This is the document Mr. Zummo was asking you  
16 about regarding some of the data that appears here.

17 A. Right.

18 Q. Do you know whether the bounce rate here is the  
19 percentage of people that didn't click on anything on the  
11:25 20 page before leaving?

21 A. Correct. And this also doesn't show -- I will let you  
22 answer [verbatim] -- the staff views and the team views  
23 internally in our office.

24 Q. Well, let me ask you that.

11:25 25 So, these unique page views -- this number

*Ramani - Recross by Mr. Zummo*

1 doesn't break out the people working on the page or the  
2 salespeople using the page on the showroom floor?

3 A. Right.

4 Q. Back to bounce rate.

11:26 5 Does this mean that 63 percent of the unique  
6 page views ended up with the people leaving the page without  
7 clicking on anything?

8 A. Correct.

9 Q. Such as floor plans?

11:26 10 A. Correct.

11 Q. And that's the same for each of these percentages that  
12 appears on this document?

13 A. Yes, sir.

14 MR. STROTHER: Thank you, Mr. Ramani. I pass the  
11:26 15 witness.

16 MR. ZUMMO: Just to follow up on that.

17 THE COURT: Sure.

18 MR. ZUMMO: If you'd leave that up, please.

19 MR. STROTHER: Mr. Zummo, let me know if you need  
11:26 20 to zoom in.

21 RECROSS-EXAMINATION

22 By Mr. Zummo:

23 Q. Exhibit 13 [verbatim] --

24 THE COURT: Do you want to go back to yours?

11:26 25 Q. -- Exhibit 103 --

*Ramani - Recross by Mr. Zummo*

1 This is good, Your Honor.

2 THE COURT: Okay.

3 Q. -- this is the only page of any documentation that Urban  
4 Living produced to us in this case involving records of who  
11:26 5 looked at your website and when. Correct?

6 A. Correct, sir.

7 MR. ZUMMO: Nothing else, Your Honor.

8 THE COURT: Anything further?

9 MR. STROTHER: No further questions from  
11:27 10 Mr. Ramani.

11 THE COURT: Thank you, sir. You may step down.

12 Call your next witness.

13 MR. STROTHER: Your Honor, at this time Defendants  
14 rest.

11:27 15 THE COURT: Defendants rest.

16 What says the Plaintiff?

17 MR. ZUMMO: We have no -- Well, actually, Your  
18 Honor, we offer Plaintiff's Exhibits 80, 81, 82, 83, 84 and  
19 85 in rebuttal to the statements by Mr. Ramani that there  
11:27 20 were only -- there's only a couple of ways or one way to  
21 design a townhome.

22 THE COURT: What are those exhibits? I have got  
23 them here, but tell me what they are.

24 MR. ZUMMO: Those exhibits are collections, just a  
11:27 25 sample, of townhome designs done over the years by Preston



1 Wood & Associates, Your Honor.

2 THE COURT: What is it again?

3 MR. ZUMMO: Starting with Exhibit 80.

4 THE COURT: Okay. 80 through?

11:27 5 MR. ZUMMO: 80 through 85.

6 THE COURT: Any objection?

7 MR. STROTHER: Yes, Your Honor. Same as it was  
8 pretrial.

9 THE COURT: All right. Ladies and gentlemen, the  
11:28 10 testimony is over.

11 Let me rule on that one set of exhibits.

12 That's all we have. In other words, if they're in, they'll  
13 consider it; if they're not, they won't.

14 MR. ZUMMO: Exactly.

11:28 15 THE COURT: So, we don't need the jury to remain.  
16 Correct?

17 MR. ZUMMO: Correct, Your Honor.

18 THE COURT: We're going to take about a five-minute  
19 break. Five-minute break. Let me see what the rest of the  
11:28 20 schedule is going to be and then we'll get back with you.

21 So, we'll see you in about five minutes.

22 (Jury not present)

23 THE COURT: We're talking about scheduling and then  
24 I'll get...

11:28 25 (Court and law clerk confer)

1 THE COURT: All right. Let's take a look at those  
2 exhibits and then we'll talk about scheduling. Okay?

3 Let the record reflect the jury is out of the  
4 room.

11:29 5 Now, I think there was a conditional ruling  
6 ahead of time. Correct?

7 MR. ZUMMO: Correct, Your Honor.

8 THE COURT: Now, why do those come in now?

9 MR. ZUMMO: Your Honor excluded them on a relevance  
11:29 10 objection but said that they could be offered in rebuttal if  
11 certain statements were made by the Defendants.

12 We originally told the Court that we were  
13 presenting them because it was the Defendant's position in  
14 this case that there was only one or only a couple of ways  
11:30 15 to design a townhome. We understood the Court's ruling  
16 pretrial, but that statement has now been made in evidence  
17 by Mr. Ramani.

18 THE COURT: Where he said what?

19 MR. ZUMMO: Where he said there is -- for these  
11:30 20 townhomes there was only one way to design the townhomes;  
21 you had to put a bedroom and garage on the first floor,  
22 living areas on the second floor, two bedrooms on the third  
23 floor, and there was only one way to do that. So, we  
24 believe that --

11:30 25 THE COURT: And, therefore, what, was his point?

1 MR. ZUMMO: His point is, as I understood it and I  
2 think the Court clarified, that he believed that the  
3 architect's design had little or no impact on the value of  
4 the homes or the revenues that they derived from  
11:30 5 commissions.

6 THE COURT: What's the response from the defense,  
7 please?

8 MR. STROTHER: Yes, Your Honor.

9 These exhibits, together, look like a giant  
11:31 10 catalog of plans. Some of them are completely unrelated to  
11 plans in this case. For example, there are some that have a  
12 28-wide footprint.

13 What Mr. Ramani testified is, when you have a  
14 footprint like 20 by 40, there are only a few different ways  
11:31 15 to do that. He listed two of them on the stand. He said,  
16 well, if you have double the length, you can put two floors  
17 and you can put more bedrooms downstairs and make it a  
18 two-story.

19 So, he didn't say there was only one way to do  
11:31 20 this. Because of that, these are not just irrelevant, but  
21 if they were offered into evidence or accepted into  
22 evidence, they would be unduly prejudicial.

23 THE COURT: Why?

24 MR. STROTHER: Because it's a giant collection of  
11:31 25 townhome designs that have nothing to do with the case and

1 haven't been testified to.

2 THE COURT: Let's go back, because I made that  
3 point. Let's talk about it, because this is the last major  
4 ruling we have got, and then we'll talk about scheduling.

11:31 5 But go on. No. The Plaintiff.

6 MR. ZUMMO: Plaintiff.

7 THE COURT: How do you get that in? Why do you  
8 need them in and how are you going to get around that, in  
9 other words, where they have a different footprint?

11:32 10 MR. ZUMMO: Well, first of all, Your Honor, the  
11 footprint that Mr. Ramani is talking about is a choice that  
12 Urban Living makes or the developer makes, because, as the  
13 Court can see from the exhibits we already have, these  
14 tracts of land where the townhomes were built are built on  
11:32 15 multiple lots. So, it's your choice how many you want to  
16 put on. And the fact that you can do different  
17 footprints -- you can even have different footprints in the  
18 same development. You don't have to have identical units --

19 THE COURT: All right. Were any of those  
11:32 20 specifically copied in that series, that 80 to what?

21 MR. ZUMMO: 80 to 85. No, Your Honor. We're not  
22 alleging that those were directly copied by Urban Living; and  
23 that's why we offer them, to show that there are many, many  
24 ways to design these townhomes.

11:32 25 THE COURT: Well, is there any contest on that

1 point?

2 MR. ZUMMO: They just testified -- he just  
3 testified that there was only one or a limited number of  
4 ways to do it, and that meant that the architect or the  
11:33 5 designer offers very little value.

6 MR. STROTHER: Your Honor, I disagree with what  
7 Mr. Zummo said regarding the testimony. Not just Mr. Ramani  
8 but Mr. Bachman and Mr. Cameron testified that the footprint  
9 is dictated not by -- by the market -- and I believe  
11:33 10 Ms. Wood as well -- that that is a product of what the City  
11 limits you to with regard to setbacks. And, so, the 20 by  
12 40 is what is set by extraneous --

13 But that's important because, sure, when  
14 you're allowed to increase your footprint by another eight  
11:33 15 feet vertically and another six feet horizontally, you can  
16 do many more different things.

17 But, again, I understand the purpose is to  
18 rebut Mr. Ramani's testimony, and his testimony is being  
19 misquoted. He did not say there was only one way to do  
11:34 20 this.

21 MR. ZUMMO: Mr. Ramani testified "just a box",  
22 that's all this is, and these show that there is a lot more  
23 than a box to townhouse design.

24 THE COURT: All right. Now, you're offering this  
11:34 25 in rebuttal for what limited purpose?

1 MR. ZUMMO: For the limited purpose, Your Honor, of  
2 showing that there are many, many ways to design an urban  
3 townhome and that those many, many ways represent exactly  
4 the kind of creativity and selection among different design  
11:34 5 choices that copyright protection is meant to afford to  
6 these designs.

7 THE COURT: That's 80 to what?

8 MR. ZUMMO: 80 to 85.

9 THE COURT: All right. Objection is overruled for  
11:34 10 that very limited purpose.

11 And what I am going to do is get the jury back  
12 in and say I have admitted Exhibits 80 to 85 which are --  
13 and then you can mention what they are and you're offering  
14 for what limited purpose only, and I say that's the limited  
11:35 15 purpose.

16 But I am also -- because I know this is not  
17 summation -- I am going to allow you to get up and say why  
18 you object to it. And then I am going to say the jury can  
19 give whatever weight, if any, it gives to this.

11:35 20 But I am going to allow both of you to get  
21 that in, to limit it down that narrowly. It's unusual, but  
22 that's all right. I am going to allow you to get up and  
23 what's the objection to it and you give me the objection  
24 just like you stated it, which is right to the point. They  
11:35 25 may buy either one or neither.

1 MR. STROTHER: Yes, Your Honor.

2 MR. ZUMMO: Your Honor, just so I don't misspeak, I  
3 stated my limited purpose. Can I have the court reporter  
4 give me that so that I don't say it in a different way?

11:35 5 THE COURT: I made some notes -- but, yes, Bruce,  
6 if you would read it back -- because that's the limited  
7 purpose. He's going to read it back and then we'll get the  
8 jury back in.

9 (Statement by Mr. Zummo read by court reporter)

11:38 10 THE COURT: And then, counsel, you get up, give  
11 basically the objection you have, which is a speaking  
12 objection, but I understand that, just so we get it in the  
13 record and both of you -- the narrowness is coming in and  
14 your objection is also voiced to the jury.

11:38 15 MR. STROTHER: Yes, Your Honor.

16 THE COURT: Now, let's talk about as far as what  
17 time the jury comes back in.

18 Now, let me ask you this, because it's now --  
19 We're about to just cut off the clock.

11:38 20 How much time does the Plaintiff want to sum  
21 up this case? Because, don't forget, we begin at 11:30 on  
22 Tuesdays.

23 MR. ZUMMO: Your Honor, maximum 45 minutes.

24 THE COURT: What do you think?

11:38 25 MR. STROTHER: I will take 45 as well, Your Honor.

1 MR. ZUMMO: I don't know if I have that much left  
2 on the Court's clock, but...

3 THE COURT: Oh, no. No. The closing doesn't count  
4 on your time, no. Once we end now, that's the end.

11:38 5 Hang on one second. Let me just talk about --  
6 And we have a long charge and, generally, it's like reading  
7 a deposition. Sometimes it's a minute a page.

8 So, let me see my staff up here. I am going  
9 to stop the clock completely now and let me just work on  
11:39 10 time.

11 (Court confers with staff)

12 THE COURT: Let me talk to the attorneys about  
13 this.

14 We get underway, let's say, as close as we can  
11:41 15 to 11:30. I don't think it will take 45 minutes to read  
16 that charge, because it gets narrowed down. But, right now,  
17 we're about 43 pages, I think. And that may work out. I  
18 may add some.

19 But looking at max time, max time, if I begin  
11:41 20 reading at 11:30, that means my reading is over at 12:15.  
21 Okay? Then the Plaintiff starts. And then we always take  
22 a -- we always take a -- When you take your break --

23 Let's say you take 30 minutes and reserve  
24 15 minutes. That would take us to 12:45. We take a  
11:41 25 15-minute break. We get back in at one o'clock. We go to



1 1:45, plus another 15 minutes. It will bring it to two  
2 o'clock.

3 I am going to tell the jurors to eat lunch  
4 early and we'll have snacks for them, some cookies or  
11:42 5 whatever, in there. That way, we can go straight through.  
6 I'm not talking about my schedule, but I'm talking about  
7 everybody --

8 Does that seem workable to you?

9 MR. ZUMMO: Yes, Your Honor.

11:42 10 THE COURT: That way, they'll get it if I tell them  
11 to eat an early lunch.

12 MR. ZUMMO: I think that works fine.

13 THE COURT: Okay. Or if they want to just wait and  
14 eat a sandwich in that one little break or whatever they  
11:42 15 want. And then, after that, I don't have anything else set.

16 Now, as far as today's schedule, I will talk to  
17 you as soon as we let the jury go and we get through with  
18 that evidentiary matter. Okay?

19 MR. ZUMMO: Yes, sir.

11:42 20 THE COURT: All right. Let's call the jury back  
21 in.

22 (Jury present)

23 THE COURT: There was a matter on the table when  
24 you left. I have made a ruling with Exhibits 80 to 85.  
11:43 25 They're in pure rebuttal. I am admitting them for a very

1 narrow purpose only.

2 So, for what limited purpose is the Plaintiff  
3 offering these?

4 You notice it's written down because it was  
11:43 5 actually dictated in.

6 For what limited purpose am I admitting 80 to  
7 85?

8 MR. ZUMMO: Your Honor, for the limited purpose of  
9 showing that there are many ways to design an urban townhome  
11:44 10 and these many ways represent exactly the kinds of  
11 creativity and collections among different choices that  
12 copyright protection is meant to afford to these designs.

13 THE COURT: Now, the Defendant objects to that and  
14 I am going to allow him to sound his objection.

11:44 15 There is objection to that offer. Is that  
16 correct, sir?

17 MR. STROTHER: Yes, Your Honor.

18 THE COURT: What's your objection, sir?

19 MR. STROTHER: We object that those five exhibits  
11:44 20 include much irrelevant information because they include  
21 plans that are not confined to the typical 20-by-40-foot  
22 footprint that the parties have been testifying about.

23 THE COURT: All right. Now, you see the limited  
24 offer and what the objection is. I am overruling the  
11:44 25 objection. It's a limited reason that I am entering it, but

1 I am saying it goes to the weight, not to the basic  
2 admissibility.

3 You have heard the offer. You have heard the  
4 objection. You give it whatever weight, if any, you think  
11:45 5 those five sets of plans deserve.

6 I am leaving it to the jury but with the  
7 strict limited offer, and you have heard a pretty strong  
8 objection to that.

9 Now, with that, anything further from the  
11:45 10 Plaintiff?

11 MR. ZUMMO: No, Your Honor. Plaintiff has no  
12 further evidence.

13 THE COURT: Anything further?

14 MR. STROTHER: No, Your Honor.

11:45 15 THE COURT: All right. The case is over.

16 Let me tell you what we'll be doing.

17 Do you have a copy of those proposed  
18 instructions?

19 I want to show you something. I do this in  
11:45 20 every case.

21 Now, in every case that goes to a jury it goes  
22 on a number of instructions and then questions.

23 I am looking at this. I see this is  
24 single-spaced. I want mine double-spaced, as we mentioned.  
11:45 25 So, it's going to be longer than this. Everything I am

1 looking at here, at least on this one.

2 But, in any event, these are the proposed jury  
3 instructions. It's the closest thing to pure academics that  
4 you get at the courthouse.

11:46 5 When I get back in with the attorneys --  
6 They'll try to agree on as much as they can with all of  
7 this. Then I'll be sitting at the head of that center table  
8 with the court reporter down there in that corner, the  
9 attorneys on each side, and we're going to discuss all of  
11:46 10 the proposed instructions.

11 They can dictate in and object to any they  
12 want. They may say, Well, we think it should be in this way  
13 or that way, and I will rule on that, we'll redraft it and  
14 we'll have it all ready for you.

11:46 15 You notice there's a whole bunch of blanks to  
16 fill in, if any, when you get there. And the last page  
17 needs to be the verdict, but we don't have a form yet on  
18 here, but we'll talk about that.

19 So, what we're going to do, we're going to  
11:46 20 adjourn for the day. It's a long afternoon.

21 In fact, when I was in state court there used  
22 to be windows at the back of the courtroom, at the back  
23 doors, and in situations like that I always invited the  
24 jurors. If they want to hang around and make sure we're in  
11:47 25 here working, they're welcome to come in and look through

1 the windows. Well, you can do the same thing with that back  
2 door, because we'll be working quite a bit.

3 You can't get -- A case like this does not  
4 come directly out of a form book; so, some of it has to be  
11:47 5 independent drafting, and that's what we'll be doing.

6 So, we're going to take a break at this time.  
7 The attorneys and I -- once you leave, we'll be talking  
8 about when I need them back to go over all of this stuff.  
9 And we'll be working on it.

11:47 10 So, tomorrow and, don't forget, every Tuesday  
11 we begin at 11:30.

12 So, this is what we're going to do. We're  
13 going to get this case to you as quick as we can without  
14 putting a rush on the lawyers. It's somewhat complex. Each  
11:47 15 side has requested and I have given them 45 minutes each to  
16 sum up the case.

17 So, when you get back in here tomorrow the  
18 first thing is I will read the instructions, and you will  
19 have a copy right on your chair. That's another thing; we  
11:48 20 need to run all the copies. All right. You will follow  
21 along.

22 And then we'll hear from the Plaintiff.  
23 Remember, they've got the burden of proof. After that, we  
24 hear from the defense. And usually the Plaintiff, in their  
11:48 25 45 minutes, will reserve a little bit of time, maybe five

1 minutes or ten minutes, to wrap up. But it's a total of  
2 45 minutes each.

3                   So, I will -- generally, the schedule is: I  
4 will read it to you. Sometimes it takes about a minute a  
11:48 5 page to read this, maybe less, because some of it is  
6 shorter. We'll hear the Plaintiff opening and they'll stop  
7 whenever they want within that 45-minute bracket. Then we  
8 hear from the defense. But we'll take a ten-minute break in  
9 between.

11:48 10                   So, I will read it to you. You will hear the  
11 Plaintiff and we'll take a ten-minute break. Then we'll  
12 hear all the defense 45 minutes and maybe the ten-minute  
13 wrap-up of the Plaintiff. Then you will have the case.

14                   My suggestion to you is to have an early  
11:49 15 lunch. I'm getting in right at 11:30 and I am going right  
16 into this. Okay? So, we'll have some snacks or something,  
17 some of Stephanie Leigh's cookies or something like that,  
18 after you get back, but I do suggest that you eat lunch  
19 first, or you will have a short break if you want to grab a  
11:49 20 quick sandwich in that ten minutes, or if you want to hold  
21 it until later on, but we will have a little something for  
22 you. I do suggest you do it ahead of time. That way, we'll  
23 get the maximum in.

24                   At that point you set your own schedule. You  
11:49 25 take breaks when you want. You decide when you break for

1 the day, within certain limits that I will give you tomorrow  
2 that I have given every jury since I have been on state  
3 court also, as to dates, as to times, that you can  
4 deliberate.

11:50 5 If anybody is sticking around this  
6 afternoon -- and you don't have to -- I am doing a pretty  
7 hot sentencing at 2:15.

8 You know these folks that call up and say that  
9 they're from the IRS and they're going to come -- I have the  
11:50 10 worldwide case.

11 (Off-the-record discussion)

12 THE COURT: We need you back here ready to resume  
13 tomorrow at 11:30, at which time we'll wrap the case up.

14 So, with our appreciation, it's short. The  
11:50 15 lawyers did a super job. They're under their time  
16 estimates, which is fine.

17 It's an interesting case. It's going to be a  
18 lot of technology going into the three days of testimony.  
19 So, we'll be working on that, too.

11:51 20 So, ladies and gentlemen, thank you. We'll  
21 see you tomorrow ready to resume at 11:30 a.m. Thank you  
22 and good afternoon.

23 (Jury not present)

24 THE COURT: I'll have these time sheets. I always  
11:51 25 give you a copy of the timesheets. I will work them up

1 later, but you did fine time-wise.

2 All right. Let's talk about scheduling.

3 The first thing, since we're down here, we

4 might as well do at this point. Let's talk about the

11:52 5 notices that you want for summation. So, give me a second

6 to do my little diagram here.

7 All right. Plaintiff, when you begin I will

8 give you notice on your opening after how much time has gone

9 past? Then you sit down whenever you want. But I will give

11:52 10 you one notice after how much time has gone past on your

11 opening?

12 MR. ZUMMO: I'd like 30 minutes, Your Honor, and

13 the plan is to spend 35 in the first part.

14 THE COURT: That's up to you. Stop whenever you

11:53 15 want.

16 All right. Now, on the defense closing,

17 summation, I will give you two notices. The first one after

18 how much time has gone past?

19 MR. STROTHER: 40 minutes, Your Honor.

11:53 20 THE COURT: And then how much time left?

21 MR. STROTHER: 43 -- You're asking how much time to

22 elapse?

23 THE COURT: Well, no. In other words, your first

24 notice is after how much time has gone past? You want a

11:53 25 40-minute notice and then how much time before you have to



1 sit down? You don't have much time left. Two minutes or --

2 MR. STROTHER: I'd like two more minutes.

3 THE COURT: Okay. So, what? Do you want a three-  
4 minute notice?

11:53 5 MR. STROTHER: Right. So, 40 and then 43, Your  
6 Honor.

7 THE COURT: Well, 40 and 43 minutes. So, that's a  
8 two-minute notice before you sit down. Two minutes left.

9 MR. STROTHER: Yes, Your Honor.

11:53 10 THE COURT: On your last go-round I will give you  
11 one notice after how much time is left before you sit down?

12 MR. ZUMMO: Eight minutes, Your Honor. So, that  
13 would be a two-minute warning as well.

14 THE COURT: Well, I'm not sure. You just tell me.  
11:54 15 Two minutes left?

16 MR. ZUMMO: Two minutes left, Your Honor, yes.

17 THE COURT: All right. What's the status of the  
18 charge as you see it?

19 MR. ZUMMO: We --

11:54 20 THE COURT: By the way, for whatever it's worth,  
21 one side used -- the Plaintiff used 54 minutes, the defense  
22 27 minutes. And I'll have this all for you when we're all  
23 done.

24 MR. ZUMMO: Judge, the first time I ever tried a  
11:54 25 case on the clock was with Judge Werlein, and there were

1 out-of-state lawyers on the other side and they apparently  
2 didn't believe it. So, when they got into their case they  
3 had, I think, 43 minutes left total and he cut them off at  
4 43 minutes and said, "You can sit down." And I think they  
11:54 5 paid attention to those time limits.

6 THE COURT: They say the U.S. Supreme Court is just  
7 like that, especially with Rehnquist, that you finish even  
8 mid-sentence. "Sit down."

9 MR. ZUMMO: We traded some e-mails over the  
11:54 10 weekend, Your Honor, and I think we're just going to have to  
11 go through with what we've submitted to the Court. We  
12 weren't able to reach any further agreements.

13 THE COURT: Okay. Realistically, the easiest thing  
14 to do would be to have me look through this and for us to  
11:55 15 get together after the noon hour. Okay?

16 MR. ZUMMO: Yes, sir.

17 THE COURT: I mean, realistically.

18 MR. BONHAM: You were saying about "I do notice  
19 that it is not double-spaced." We can print that  
11:55 20 double-spaced for you right now.

21 THE COURT: It doesn't matter. I can work from  
22 this, but when it comes time to do the actual reading I want  
23 it double-spaced.

24 MR. BONHAM: Will do.

11:55 25 THE COURT: So, for the last go-round I want it

1 double-spaced. Don't forget you want a corrected title on  
2 this case. I am looking here. I see it doesn't have that  
3 here at the top.

4 And for sure you know to knock out all the  
11:55 5 footnotes when it comes time to give it to the jury.

6 And you do have it paginated. It's real  
7 important for you arguing the case to have it paginated.

8 The last page, by the way -- you don't have to  
9 have it now -- but the last page is a separate page for the  
11:56 10 verdict. In other words, it just says the title of the case  
11 and then you say "Verdict". And I will quote. This is  
12 exactly what it says. "We, the jury, return the foregoing  
13 as our unanimous verdict."

14 Then you jump down and there is a line for the  
11:56 15 presiding juror. And in federal court, as you know, you  
16 must have a date line.

17 So, why don't we do that. In other words, see  
18 if you can narrow it down. You will have the run of the  
19 courtroom.

11:56 20 I have a meeting with the Chief Judge and a  
21 couple -- one circuit judge on some housekeeping matters at  
22 1:30.

23 I'll be here at 2:15 and do that sentencing,  
24 and then as soon as that's done we'll get underway here.

11:57 25 So, literally, and what I am going to do -- I

1 assume everything in italics is that you don't agree with.  
2 Right?

3 MR. ZUMMO: That's correct, Your Honor.

4 THE COURT: How does it work once I start reading?

11:57 5 It says "Submitted by the Plaintiff" and --

6 MR. ZUMMO: Usually, "The Defendant objects and  
7 submits the following."

8 MR. STROTHER: Sometimes I would say "The Defendant  
9 objects to this entire instruction." However, if the Court  
11:57 10 is going to let it in --

11 THE COURT: Like No. 16 submitted by Plaintiffs:  
12 "The Defendant objects and submits Instruction 17 as a  
13 replacement," and on the next page is what you think is a  
14 replacement. Correct?

11:57 15 MR. STROTHER: Right.

16 THE COURT: "No. 18 submitted by Plaintiff."

17 And, Defendant, you object to all of No. 18.  
18 Correct?

19 MR. STROTHER: Yes, Your Honor, but I would like to  
11:57 20 call the Court's attention to No. 18. We actually filed an  
21 alternative Instruction 18 this morning at 6:00-something.

22 THE COURT: Where is it?

23 MR. STROTHER: I have 11 or so courtesy copies in  
24 the breakout room across the hallway.

11:58 25 THE COURT: You got that? All right. So, I will

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1 just put this right behind.

2 MR. STROTHER: Thank you, Your Honor.

3 THE COURT: All right. That's the sort of thing.

4 Why don't you sit down and give it one more shot to see if  
11:58 5 you can narrow it down.

6 Aside from that, when we get in, don't forget  
7 all your objections are going to be made around that table,  
8 nothing tomorrow morning.

9 When I get in here, one side or the other is  
11:58 10 going to have all copies run and they will be on Ellen's  
11 desk at a certain time, and I'll get in and we'll start  
12 reading.

13 All right. Is there anything else you need to  
14 get on the record before we adjourn until 2:30?

11:58 15 MR. ZUMMO: Not from Plaintiff.

16 MR. STROTHER: I have a question, Your Honor.

17 THE COURT: Yes, sir.

18 MR. STROTHER: May the parties and witnesses be  
19 fully excused?

11:58 20 THE COURT: Oh, yeah, they can be excused at that  
21 point. It's just pure academics.

22 All right. I'll see you back at 2:30.

23 MR. ZUMMO: Yes, Your Honor.

24 (Recess)

14:57 25 THE COURT: Anybody can join in, as far as other

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1 lawyers go, but remember that he can take down just one at a  
2 time.

3 All right. I am going to start looking down.  
4 Don't forget about cleaning up that title. Okay.

14:57 5 MR. COOPER: Yes, sir.

6 THE COURT: Also, this is, I guess you could say,  
7 "Jury Charge - Proposed" and "Jury Questions". And in each  
8 one of these things knock out the footnote designation and  
9 at the bottom. Those are out on everything as you type up.

14:57 10 I read quickly and, even though it's a  
11 standard, I am going to read through everything. So, give  
12 me a moment.

13 MR. BONHAM: May I stop you, Your Honor. Again,  
14 the first paragraph, because we have, in addition to the  
14:58 15 evidence, the Agreed and Stipulated Facts --

16 THE COURT: Yeah.

17 MR. BONHAM: -- and, so, what I would propose to  
18 add is --

19 THE COURT: Is it by agreement?

14:58 20 MR. BONHAM: It is by agreement.

21 THE COURT: Okay. Fine. Keep going. As long as  
22 it's by agreement, unless it's unusual, that's fine.

23 Keep going. Thank you for telling me.

24 [Reading] Well, "he". "He is called..." "He  
14:58 25 or she is called..."

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1 By the way, I am looking at the bottom of this  
2 one. It's not paginated here. I don't know where you pick  
3 up your numbered --

4 MR. STROTHER: Page 7.

14:58 5 THE COURT: But everything else here ought to be  
6 paginated. But it's "He or she is called an expert witness"  
7 and it's "state his or her opinion", since we had a woman  
8 expert in this case.

9 And, again, here's another one. You can look  
14:59 10 where I am making a circle.

11 Okay. I don't see numbers here either.  
12 Anyhow, just make sure everything is sequentially paginated  
13 at the bottom. Okay?

14 MR. BONHAM: Yes, sir.

14:59 15 THE COURT: But I am looking up at the upper right.  
16 It says Page 5 of 3.

17 MR. BONHAM: We think we have solved our problem on  
18 Instruction No. 1.

19 THE COURT: On all of No. 1?

15:00 20 MR. BONHAM: Yes, Your Honor.

21 THE COURT: Then, I am just going to put "by  
22 agreement".

23 Then we move to Proposed No. 2. Now, this  
24 is -- is there still a question now we have to look at  
15:00 25 No. 2?

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1 MR. BONHAM: The only question, Your Honor, is --  
2 The first two paragraphs are agreed. We would like the next  
3 two added. Mr. Strother objects and instead wants to put  
4 his proposal.

15:00 5 THE COURT: All right. Let me take a look.

6 This is Plaintiff's Proposed. It says: "An  
7 architectural work may be 'copied' by constructing or  
8 selling a building that is based on the protected design.  
9 To establish infringement of its copyrights Preston Wood  
15:01 10 must prove..."

11 The Defendant's proposed language -- That's  
12 your proposed language as to the whole thing? That's all  
13 you want, these two? You don't agree to the Plaintiff's and  
14 you want this instead --

15:01 15 MR. STROTHER: Yes.

16 THE COURT: -- or you want it in addition?

17 MR. STROTHER: Instead, Your Honor.

18 THE COURT: All right. Let's talk about it.

19 Why does the Plaintiff think that that's  
15:01 20 needed and what's wrong with the defense? And then we'll go  
21 the other way.

22 MR. BONHAM: The reason, Your Honor, is, again, I  
23 think we need to have the Court explain to the jury the  
24 elements of the claim, which is ownership and copying, and  
15:01 25 then you're going to instruct the jury that 'I have already



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1 found ownership of the valid copyrights.' If you just  
2 present it in this fashion, that copying is the only  
3 element, I don't believe that's accurate under the law. The  
4 elements are very well established.

15:02 5 THE COURT: Well, your position is an architect  
6 work may be copied by constructing or selling a building  
7 that is based on the protected design.

8 MR. BONHAM: Correct.

9 THE COURT: Ordinarily, you look at that -- That's  
15:02 10 where you're giving away a bit of what the perception would  
11 be. Right?

12 MR. BONHAM: Correct.

13 THE COURT: Then you move to "To establish  
14 infringement..." Okay?

15:02 15 MR. BONHAM: Correct.

16 THE COURT: "Infringement based upon..." They can  
17 do this: "But to establish infringement of its copyrights,  
18 they have to prove ownership of a valid copyright in the  
19 work and 'copying' of that work by any of the Defendants."

15:02 20 All right. Now, what the defense wants  
21 instead of those two is: "To establish infringement of its  
22 copyrights, Preston Wood must prove 'copying' of its work by  
23 any of the Defendants."

24 Again, I am not taking sides. I am really not  
15:03 25 in this thing as it goes forward. But, in a way, doesn't

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1 the first two help you more than just putting yours in? I  
2 mean, I am just reading it cold. I don't do this for a  
3 living. I mean, I do it when a case pops up.

4 But isn't this, in a way, more helpful to your  
15:03 5 case than just that? Because copying -- All right; they  
6 copied it.

7 MR. STROTHER: I look at the two Plaintiff's  
8 proposed paragraphs as independent. So, my answer to the  
9 Court's question regarding the second paragraph: It would  
15:03 10 be more helpful to me to have those two elements there, but,  
11 admittedly, the first element is not an issue. We have not  
12 contested that there is a -- we're not arguing that there is  
13 an invalid copyright. I said it in opening statement.  
14 Judge Atlas has ruled that all the copyrights are valid.  
15:03 15 So, that's not an issue before the jury. So, just,  
16 procedurally, to weigh them down with unnecessary  
17 elements -- I just want it to be clear.

18 THE COURT: Well, I think somebody -- Again, let's  
19 talk about how you do it practically as a trial lawyer.

15:04 20 You would say, 'Look. This is what we've got  
21 to prove. This is what the Judge says on Page 7. But it's  
22 already stipulated; that we would have to ordinarily prove  
23 that, but we don't in this case. It's been agreed and,  
24 therefore, No. 2 is the only one we're proceeding on.'

15:04 25 Is that the point you're trying to make?

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1 MR. STROTHER: It is. And I told Mr. Bonham that,  
2 if that your philosophy, then I would be quiet about it. I  
3 didn't know which of the various ways --

4 THE COURT: Well, then, looking at it from that  
15:04 5 point of view, it may be easier just to say 'For purposes of  
6 this case, it's copying of that work by any of the  
7 defendants.'

8 I am trying to run one off against the other.  
9 I am going to ask you, eventually, how you feel about it.

10 By the way, if any time you need to get up and  
15:04 11 confer on the side, it's all right with me.

12 Let's take a look at that. Anybody want to  
13 talk about it?

14 MR. ZUMMO: Honestly, Your Honor, I am indifferent  
15:05 15 because I am kind of with Mr. Strother. The issues that the  
16 jury needs to decide we certainly have to have detailed  
17 instructions on, but to tell the jury there are these other  
18 elements where we have already agreed to them -- I don't  
19 think it hurts to do that. I don't think it's necessary to  
15:05 20 do that.

21 So, that's my personal feeling about it.

22 THE COURT: Well, what you might want to do:  
23 "...establish infringement of its copyrights in this  
24 case..."

15:05 25 MR. STROTHER: I was thinking that.

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1 THE COURT: "In this case". And you can say -- you  
2 can argue -- Ordinarily, you would have had to prove  
3 ownership and copying, but it's already been agreed to.  
4 That's why it's only "copying in this case".

15:05 5 MR. BONHAM: All right. We can do that.

6 THE COURT: So, how does that work, then? Do you  
7 want to knock yours out and just use his?

8 MR. BONHAM: Well, we knock the second blank, the  
9 one that starts "To establish infringement..." I will take  
15:06 10 that out and we'll go with Mr. Strother's with those three  
11 words added.

12 THE COURT: Okay. So, "An architectural work may  
13 be 'copied' by constructing or selling a building that's  
14 based on the protected design."

15:06 15 MR. BONHAM: Again, Your Honor, it's an accurate  
16 statement of the law.

17 THE COURT: "An architectural work may be 'copied'  
18 by constructing or selling..." Okay. All right. Now, why  
19 do you want that out?

15:06 20 MR. STROTHER: I think it's clutter. I don't  
21 disagree that that is an accurate statement of the law.

22 THE COURT: You don't disagree?

23 MR. STROTHER: I don't. I just think it's clutter.

24 THE COURT: All right. Then, it's going in.  
15:06 25 That's going in and the last one is going in.

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1 By the way, some of these I am going to go  
2 back and look at myself and maybe look up some of the books,  
3 but if it's that close -- I appreciate, you know, your  
4 position. Anytime anybody needs to protect your position,  
15:07 5 get it in the record. But you have been at this business a  
6 while. It shows. And that's a positive.

7 So, let's move on.

8 The next one -- this is submitted by the  
9 Plaintiff. Okay?

15:07 10 MR. BONHAM: This one I think is going to -- if  
11 we're solving it -- Yeah. We have solved it on Instruction  
12 No. 2; so, 3 is out.

13 THE COURT: Okay.

14 MR. ZUMMO: And 4 also.

15:07 15 THE COURT: 4 also out?

16 Don't forget. You can argue within this.  
17 That's the thought I had to some of these. You can argue  
18 within it. The question is do you need --

19 Okay. We're now on Page -- upper right,  
15:07 20 Page 10 of 43 pages. What about this one?

21 MR. STROTHER: It's submitted by Defendants.

22 MR. BONHAM: 5, 6 --

23 THE COURT: Now, this is by Defendant. Plaintiff  
24 objects to No. 5.

15:07 25 MR. BONHAM: Correct. Essentially, 5, 6, 7 and 8

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1 are ones that Mr. Strother has submitted, which is basically  
2 his view of, you know, what copyright law covers and what it  
3 doesn't, and we have got that covered in our Instruction  
4 No. 9. And, so, we essentially have kind of dueling  
15:08 5 instructions on that.

6 THE COURT: So, you're saying Proposed Instructions  
7 5, 6, 7 and 8 are all, in your mind, subsumed in your No. 9?

8 MR. BONHAM: Yes, Your Honor.

9 THE COURT: Let me look at No. 9 first. Then we  
15:08 10 can go back. Okay?

11 MR. ZUMMO: 9 is on Page 15, Your Honor.

12 THE COURT: There it is. All right. The whole  
13 concept of copying, what you can copy and what you can't  
14 copy. Right? This is where you're going to have to lay it  
15:08 15 out for the jury.

16 Now, that's a Tenth Circuit case, that first  
17 one. Correct?

18 MR. BONHAM: Correct. There are others that --

19 THE COURT: Also, it says, "as I mentioned before".  
15:08 20 Is that still "as I mentioned before" --

21 MR. BONHAM: I believe so.

22 THE COURT: -- based upon the first few?

23 MR. BONHAM: Correct. It's on Instruction No. 2  
24 where it says "Copying is a shorthand version..."

15:09 25 THE COURT: What I usually do, I don't make any

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1 comments as to what's going on. I don't mind. It'll add to  
2 it. Let's leave it, if I go this route.

3 "As I mentioned before, 'copying' is a  
4 shorthand reference to any infringement of the copyright  
15:09 5 holder's exclusive rights, not just literal copying." And  
6 "copied" in the second sentence is in quotes.

7 Let me just read through here and then I am  
8 going to go back and see what he's got.

9 A lot of this has circuit background. I have  
15:10 10 not farmed that ground anywhere, I guess.

11 "You may find that a party had access to the  
12 work if the party had reasonable opportunity..." Well,  
13 didn't they? Do you need that one?

14 MR. BONHAM: They have stipulated to access on all  
15:10 15 but one and, so, because they're not --

16 THE COURT: All right. Got it.

17 MR. STROTHER: By the way, Your Honor, the portion  
18 you're reading we do not object to. Remember, that if it's  
19 not in italics we're okay with the language.

15:10 20 THE COURT: All right. So, you say, "That's okay  
21 but."

22 Now, why do you need the remainder there, your  
23 proposed language? The case involves -- I will tell you,  
24 before I even read what you have, I generally don't go and  
15:11 25 get very case-specific. I try to go just with the law and

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1 the abstract principles rather than say, 'As you recall, in  
2 this case you heard this and you heard that.' I don't do  
3 that at all, generally.

4 So, let me look and see what you have. If you  
15:11 5 agree or if it's needed, certainly I will go with it, but,  
6 generally, that's the way I am in all my jury charges.

7 All right. This business about "access to  
8 designs", is that a contested matter?

9 MR. ZUMMO: Only on one with -- You heard the  
15:11 10 Stanford Street project.

11 THE COURT: Boy, you're getting into some weeds  
12 here, meaning that there's a possibility for real confusion.  
13 Because I listened to it and they did, too. They may not  
14 have...

15:12 15 Of course, you can argue it, but you're going  
16 to have to say, 'Now, when you get to this, these last  
17 paragraphs refer only to the Stanford Street properties.'  
18 It's going to be awkward. If you can find some way around  
19 it...

15:12 20 By the way, we will take a break from time to  
21 time where you can discuss to see how you're going to argue  
22 it and the effect it has when it comes to answering an  
23 objective question.

24 MR. ZUMMO: My plan would be to argue -- to start  
15:12 25 with the agreed facts on this subject, to say we have an



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1 agreed -- we agree that there was access to four of the  
2 five --

3 THE COURT: So, why don't you put down this applies  
4 only, if at all, to the Stanford properties?

15:12 5 MR. ZUMMO: I think that would be helpful, Your  
6 Honor.

7 THE COURT: If at all. If it's applicable, if at  
8 all, it will be to just this one set of plans. It's just a  
9 thought. We can come back. But that's why I was  
15:13 10 saying --

11 What's your position on that one?

12 MR. STROTHER: I think that that would soften my  
13 objection to some of the language that's in italics, but as  
14 it goes further into the next page my objections become  
15:13 15 stronger.

16 THE COURT: Applicable to -- what is it? --  
17 S-t-a-n --

18 MR. STROTHER: Stanford.

19 THE COURT: Stanford Street, is it?

15:13 20 MR. ZUMMO: Stanford Street Landing.

21 THE COURT: Stanford Street Properties. Right?

22 Take a look at those. And if you need time to  
23 work with one another when I come back, if there's anything  
24 left that you object to -- say, you object to some items  
15:13 25 later on, where later on? Which ones?

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1 MR. STROTHER: Your Honor --

2 THE COURT: Just on Stanford Street now. So, that  
3 narrows it down.

4 MR. STROTHER: Correct. I would object to the last  
15:14 5 two sentences in italics -- the last two photographs.

6 THE COURT: All right. Who is that that you had in  
7 mind?

8 MR. STROTHER: I don't know.

9 MR. BONHAM: Well, again, in this instance there is  
15:14 10 no question that Urban Living --

11 THE COURT: Hold it. Let's see. This is  
12 Plaintiff's proposed. I'm sorry.

13 Okay. Your position?

14 MR. BONHAM: Our position on this is that, clearly,  
15:14 15 Urban Living had access to our work. Clearly, Cameron had  
16 access to our work. Clearly, Oppidan had access to our  
17 work. Ms. Wood testified to that.

18 Their argument is that Mr. Wooten created the  
19 works for EaDo, Stanford and Patterson, but he somehow did  
15:14 20 it independently. Now, he had access to it through all  
21 these --

22 THE COURT: Who did?

23 MR. STROTHER: But, Mr. Bonham, this is only about  
24 Stanford.

15:15 25 MR. BONHAM: Correct. You're claiming that Wooten

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1 created Stanford.

2 MR. STROTHER: Correct -- No. I'm sorry. I am  
3 claiming that you haven't shown any evidence that Urban  
4 Living or Cameron or Wooten had access.

15:15 5 MR. BONHAM: Again, we did that Oppidan had access,  
6 we did that Urban Living had access, and we say that's  
7 imputed to Wooten.

8 MR. STROTHER: But not Stanford. I don't believe  
9 you have put on any evidence that Oppidan ever built using  
15:15 10 the Stanford plans. That's why I have carved Stanford out.  
11 Right?

12 If you look at your pleadings and look at what  
13 you alleged Stanford was copied from, you didn't put on  
14 evidence that Oppidan built using those plans for other  
15:15 15 projects. So, that's why I am carving out Stanford and  
16 mine's different.

17 THE COURT: You also have in your last paragraph  
18 here something that may help you or not. "You may also  
19 infer access if an accused design is so strikingly  
15:16 20 similar..." It gives a lot of area for them to drive a  
21 truck through with their theory -- I am just looking at  
22 it -- if you know what I mean.

23 "So similar"? That's what a lot of this  
24 alleged copying is. It's the extent of the copying and they  
15:16 25 threw in a lot of their "position" -- I was going to say

## Charge Conference

1 "skunks" -- into the jury box.

2 You have heard that term before where you  
3 said, "It's not so similar." "So strikingly similar"?

4 Now, I'm not arguing one case or another. I  
15:16 5 am just saying I will let you work it out. If you can't, I  
6 will come back and rule on it.

7 MR. ZUMMO: I am just going to toss this out for  
8 Mr. Strother to consider.

9 If we go back to the agreed last sentence on  
15:16 10 Page 15: "Preston Wood & Associates would only establish  
11 that a party had a reasonable opportunity to view the  
12 Preston Wood & Associates' work." If we added a comma,  
13 "either directly or through a third party," comma -- Could  
14 you agree to that and then we drop our other three  
15:17 15 proposed?

16 MR. STROTHER: Maybe.

17 MR. ZUMMO: If you want to think it through.

18 THE COURT: I am going to put this on hold, then.  
19 Right? I am going to put this on hold, this whole section  
15:17 20 on hold.

21 MR. STROTHER: While we're at a pause, are you sure  
22 we totally agree on Instruction No. 1? I thought there was  
23 a sentence or two -- You may have decided not to -- I'm  
24 sorry to take us backwards.

15:17 25 MR. BONHAM: Okay. Just so that we're clear: What

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1 we had talked about is that on Page 5 of 43 we were going to  
2 go with our language in italics.

3 MR. STROTHER: All the way through at 7 on the --

4 MR. BONHAM: Oh. Okay. I see what you're saying.

15:18 5 You're saying that the stuff after --

6 MR. STROTHER: Correct. Correct.

7 THE COURT: What?

8 MR. BONHAM: I have to go back to Instruction 1  
9 again.

15:18 10 THE COURT: Okay.

11 MR. STROTHER: We met and we did a lot of good  
12 work, but I think he highlighted what I objected to; so, it  
13 looked like I had agreed to it.

14 MR. BONHAM: It's fairly straightforward, then.

15:18 15 THE COURT: Where is it?

16 MR. BONHAM: On Page 5 of 43 --

17 THE COURT: Go on.

18 MR. BONHAM: -- everything is agreed down to this  
19 last language which starts "These are..." The next two  
15:18 20 sentences are things that we want in but Mr. Strother does  
21 not.

22 THE COURT: "These are not themselves protected by  
23 copyright, but the design of the buildings included in them  
24 is protected"?

15:19 25 MR. BONHAM: Correct.

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1 THE COURT: And then the next sentence, also, you  
2 want in?

3 MR. BONHAM: Yes, sir.

4 MR. STROTHER: And I withdraw my objection to that  
15:19 5 very last sentence, the one that you just read, that  
6 "copyright protection for an architectural work may  
7 encompass" --

8 THE COURT: So, we're looking at that one sentence,  
9 then.

15:19 10 MR. BONHAM: That one sentence, then.

11 MR. STROTHER: And I don't think it's an incorrect  
12 statement of the law. I think it's in here too many times  
13 and it's a comment by itself when it's repeated right there  
14 in that context.

15:19 15 THE COURT: "Standard features are staple building  
16 components..."

17 MR. STROTHER: I do think that the word "design" is  
18 sloppy.

19 THE COURT: See if you can work on that. If not,  
15:20 20 come back and we'll -- I will give you a ruling on that if  
21 you can't agree. I understand it.

22 Keep in mind, if it's done beforehand, the  
23 safest thing to do is "agreed"; you don't need. If you  
24 think you need it, I will rule on it and give you a ruling.

15:20 25 So, it's not that I'm not doing it. "Not

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1 agreed." Mark that down and we'll talk about it while you  
2 see if you can work it out.

3 All right. So, where are we now? Back on  
4 Page 16? I have "hold" on Page 16.

15:20 5 MR. STROTHER: I think we have to go back to  
6 Page 10.

7 THE COURT: Now Page 10?

8 MR. STROTHER: Right. Don't we return to mine?

9 THE COURT: Oh. Yeah. Yeah. Okay. Page 10.  
15:20 10 That's right. You're going to see if you can work on --  
11 Well, you were going to see, if you added "applicable to  
12 Stanford Street properties", that we don't need yours.  
13 Okay?

14 MR. BONHAM: That takes all the --

15:20 15 THE COURT: Then, we don't need yours. Okay? But  
16 let's go back and look at it. All right?

17 MR. STROTHER: Okay.

18 THE COURT: Is that correct?

19 MR. STROTHER: When you said, "We don't need  
15:21 20 yours," you mean we don't need mine?

21 THE COURT: Yeah.

22 MR. STROTHER: No. They're very different.

23 THE COURT: Oh. They are different?

24 MR. STROTHER: Yes.

15:21 25 THE COURT: All right. Now, what, basically, is 5

*Charge Conference*

1 through 8, before I start looking?

2 MR. STROTHER: More than one thing.

3 So, a couple of them are instructions on two  
4 of my clients' affirmative defenses. I'm going to give a  
15:21 5 quick preview, but let's go back.

6 Instruction 7 is the doctrine of scènes à  
7 faire, which my client has pled --

8 THE COURT: Now, does it say you have got the  
9 burden of proof on that or do you not have the burden of  
15:21 10 proof?

11 MR. STROTHER: I do have --

12 THE COURT: All right.

13 MR. STROTHER: That's interesting. The doctrine --  
14 While it is pled as an affirmative defense, the doctrine is  
15:21 15 the doctrine, and it basically says copyright protection is  
16 denied to expressions that are standard --

17 THE COURT: So, it's an instruction without a  
18 question. Correct?

19 MR. STROTHER: Right. Correct.

15:21 20 THE COURT: All right. Go on.

21 MR. STROTHER: Similarly, Instruction 8 is the  
22 merger doctrine.

23 THE COURT: So, it's a doctrine that they consider,  
24 but they don't have a question.

15:22 25 MR. STROTHER: Right.



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1 THE COURT: All right.

2 MR. STROTHER: 5 and 6 get into the concept of  
3 protected and unprotected elements.

4 THE COURT: Where do you get that from? Ninth  
15:22 5 Circuit pattern jury and a Fifth Circuit case. Right?

6 MR. STROTHER: Correct. No. 5, yes. So, while the  
7 Fifth Circuit doesn't have a pattern jury charge, the Ninth,  
8 of course, probably would. There is a lot of copyright  
9 going on. They have a very clear pattern instruction on  
15:22 10 ideas of expression.

11 THE COURT: Okay.

12 MR. STROTHER: Instruction No. 6. This comes from  
13 United States Supreme Court and Fifth Circuit precedent.

14 THE COURT: What does is basically say?

15:22 15 MR. STROTHER: You can't use a copyright to protect  
16 unprotectable elements. And then it explains how the jury  
17 can determine what is unprotected.

18 THE COURT: Well, you know, somewhere you're going  
19 to have to either argue this or have a clear instruction on  
15:23 20 it, because it's really tough. And I have done a lot of  
21 copyright cases. But it's a really tough concept to argue  
22 versus having an instruction, if it'll fly.

23 All right. So, where do you want to begin?

24 MR. STROTHER: I think Instruction No. 5, Your  
15:23 25 Honor, which is page 10.

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1 THE COURT: That's, what, ideas and expressions.

2 [Reading] That's basic copyright law. Boy,  
3 that's tough just reading it with a law audience.

4 All right. Read that. Read that. Everybody.

15:24 5 I am sure you have. I am thinking out loud. That is  
6 complicated as hell.

7 Now, if you need all of that technology in  
8 there, all of that technical stuff -- if he's right and I  
9 keep it out, he's got a point -- I don't know if it's  
15:24 10 reversible or not. You guys do this work all the time. I  
11 am just saying I understand, barely, what's that -- Because  
12 I have done so much of this, from my point of view, not day  
13 to day like some of your firms. But if it's absolutely  
14 necessary it'd better be in. If it's not necessary, it's  
15:24 15 almost like you're talking in circles, although I understand  
16 it. When you get down there, they may go off on the wrong  
17 tangent.

18 We're looking at about how juries -- I have  
19 talked to every jury in federal court, every one, for 32  
15:25 20 years. I don't mind taking questions. I don't mind giving  
21 them answers to questions. But if you tell somebody on this  
22 one what does that mean -- you know, the standard response  
23 is "Please consider the charge as written and the evidence  
24 as submitted in court." You may get people going off on  
15:25 25 tangents that you don't want.

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1 I am saying -- I'm not saying what you're  
2 saying is not correct. The question is: Is it necessary?  
3 I don't know. If it's necessary, then it better be in. If  
4 it's not necessary, it's very confusing.

15:25 5 MR. ZUMMO: I agree a hundred percent. I think the  
6 problem is an accurate statement of the law in an appellate  
7 opinion may not be the law that the jury needs to be  
8 instructed on.

9 THE COURT: Sure. Absolutely.

15:26 10 MR. ZUMMO: And where I think the problem comes --  
11 and Your Honor knows the lingo -- which is the difference  
12 between an idea and an expression of the idea for copyright  
13 law. I don't know how many paragraphs we go into in a jury  
14 instruction to start explaining that.

15:26 15 THE COURT: But it's your position that you need it  
16 in there?

17 MR. ZUMMO: I don't think we need it in this form.  
18 And I think the trouble with approaching it as -- For  
19 example, "Ideas and Expression" as a subheading is --

15:26 20 THE COURT: How are you going to argue that, both  
21 sides? How are you going to argue it?

22 MR. STROTHER: There's a couple of sentences in  
23 here that I would use to say, 'Listen. The Court is saying  
24 that it's a violation of copyright law to copy someone's  
15:26 25 expression. In this case the expression is the plan.' If

## Charge Conference

1 the idea --

2 THE COURT: Yeah, but you can copy up to a point,  
3 right, and, after that, you can't?

4 MR. STROTHER: Right. Right.

15:27 5 THE COURT: I am just throwing it out as if I was a  
6 juror.

7 MR. STROTHER: By way of example, the idea of  
8 having a second floor with a kitchen, living room and dining  
9 room is an idea; and, so, if one is not exactly replicating  
15:27 10 that expression of the idea, that's not a violation of  
11 copyright law.

12 MR. BONHAM: I disagree with that.

13 MR. STROTHER: They disagree, but that's okay.

14 MR. BONHAM: The question is, if you had simply  
15:27 15 said, for example, the idea of a three-story townhouse --  
16 We're not claiming that we have all this, but once you get  
17 into, 'Okay. It's the idea of a three-story townhouse as  
18 expressed by putting the rooms in this order,' now you're  
19 into the expression side.

15:27 20 And, again, I agree with Mr. Zummo. Once you  
21 start getting into this and you start injecting this, now we  
22 have got to start getting in and explaining a lot more and  
23 the charge goes from -- it starts to really get out of hand.

24 MR. ZUMMO: Obviously, the Court knows what I was  
15:28 25 doing with Suzanne Labarthe. I walked through 'Were these

## Charge Conference

1 creative decisions?' 'Were those creative decisions?'

2 I anticipated that there might be some  
3 instruction in this regard, and I'll be arguing that all of  
4 these decisions were creative choices among other choices.

15:28 5 I don't think that some instruction along  
6 these lines somehow is error or hurts my case, but I think,  
7 when we get into the weeds of the copyright terminology,  
8 like "idea" and "expression", it gets very difficult.

9 THE COURT: This may be getting into the weeds, but  
15:28 10 then, again, if it's a correct statement of the law...

11 I am going to hold on that one, meaning I will  
12 hold. I want to look at it myself. And I will come back  
13 out and see if you have worked it out. If not, I will rule.

14 MR. STROTHER: Your Honor, the final thing I'd  
15:28 15 point out is the first two paragraphs -- this is not cobbled  
16 together from a series of trial courts or even circuit  
17 courts. This is Ninth Circuit pattern model; so, this isn't  
18 me writing this trying to make it sensible. This is what a  
19 panel of Ninth Circuit judges wanted to put together.

15:29 20 MR. ZUMMO: I think it's more like a committee.

21 MR. STROTHER: That's a bad word.

22 MR. ZUMMO: That's a bad word.

23 MR. BONHAM: And the other thing, too: Is this the  
24 most recent Ninth Circuit instruction? I think they  
15:29 25 superceded this one.

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1 MR. STROTHER: I can confirm.

2 MR. BONHAM: It doesn't matter.

3 THE COURT: All right. The next one. We're  
4 looking at No. 6.

15:29 5 MR. STROTHER: This one I did put together, Your  
6 Honor.

7 The idea of protected and unprotected elements  
8 absolutely, in my opinion, requires some kind of instruction  
9 because, otherwise, it doesn't appear anywhere in the jury  
10 questions. There is no doubt that, in the Fifth Circuit, a  
11 filtering process needs to be undertaken, in my opinion, and  
12 you have got to filter out -- the factfinder has to filter  
13 out the unprotected elements before deciding whether there's  
14 been infringement.

15:30 15 MR. BONHAM: I disagree, Your Honor. The *Apple*  
16 *Barrel* case directly talks about that.

17 THE COURT: What's that case?

18 MR. BONHAM: That is a Fifth Circuit case in 1984.  
19 And I highlighted the --

15:30 20 MR. STROTHER: 1984?

21 MR. BONHAM: Yes.

22 MR. STROTHER: Your Honor --

23 THE COURT: What do you got? You got something  
24 more recent?

15:30 25 MR. STROTHER: Yes, Your Honor. *Nola Spice* in 2015

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1 walks through --

2 THE COURT: Which one?

3 MR. STROTHER: This is Fifth Circuit. *Nola Spice*,  
4 which talks about all of the other Fifth Circuit precedent  
15:30 5 and United States Supreme Court precedent. This originates  
6 from the *Feist* case in 1991, which is the very first case  
7 we're taught in law school regarding copyright law.

8 Kudos to my opposing counsel, but this is  
9 not -- this should not be a hard decision for the Court.

15:30 10 MR. BONHAM: Again, I disagree.

11 One reason is in *Nola Spice* you've got a --  
12 They discuss copyright. It was mostly a trademark case.  
13 They talk about it in a very narrow point at the end. I  
14 don't believe they talk about *Apple Barrel*. *Apple Barrel* --  
15:30 15 You know, the idea that you involve abstraction,  
16 infiltration in non-computer code cases, I don't believe, is  
17 the Fifth Circuit --

18 THE COURT: You have got those cases. I know  
19 you've got it highlighted. It was highlighted in orange. I  
15:31 20 was watching what you have.

21 MR. STROTHER: Yes.

22 THE COURT: Stick it over here because we have got  
23 time for us to go look at that also.

24 MR. STROTHER: There are a lot of cases. Your  
15:31 25 Honor, I would like to call your attention to something I

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1 thought was a very good writing by Judge Lake on this  
2 matter.

3 Judge Lake, in 2015, talks about the cases I  
4 have been mentioning -- *Nola Spice*, *Feist Publications* and  
15:31 5 other Fifth Circuit opinions such as *Peel* and *Kepner-Tregoe*.  
6 He goes through and breaks this down in exquisite detail.  
7 So, I am going to give that to you as well.

8 THE COURT: About what? What does it say, the  
9 bottom line?

15:31 10 MR. STROTHER: The filtration analysis must be  
11 performed by the factfinder -- "filtration" being  
12 identifying the protected and the unprotected elements.

13 MR. ZUMMO: The problem -- and Mr. Strother is  
14 correct that this *Nola Spice* decision is more recent than  
15:31 15 *Apple Barrel*, but a later panel of the Fifth Circuit cannot  
16 overrule a previous panel.

17 THE COURT: If they're different.

18 MR. ZUMMO: They are adopting a new principle here  
19 that's overruling lots of earlier decisions without even --

15:32 20 THE COURT: Who was on the panel?

21 MR. STROTHER: For *Nola Spice*?

22 THE COURT: Yeah.

23 MR. STROTHER: By the way, I think *Nola Spice* was  
24 actually adopting a United States Supreme Court decision,  
15:32 25 the *Feist* case, which was from 1991, which I would have to



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1 compare *Apple Barrel* with *Feist*.

2 THE COURT: Who was on that panel?

3 MR. STROTHER: *Nola Spice*, Your Honor, was  
4 Judges King, Graves and Higginson and it was written by  
15:32 5 Judge Higginson.

6 THE COURT: Yeah.

7 MR. BONHAM: Again, as Mr. Zummo points out, I  
8 think we actually had this in an architecture case that you  
9 decided about 15 years ago, the *King Empire* case, where you  
15:33 10 had two Fifth Circuit opinions that conflicted and, as you  
11 pointed out, if you have them passing like ships in the  
12 night like this, later on it's treated as a nullity.

13 So we're clear again: I'm not contending --  
14 You know, *Feist* is very clear about you only protect things  
15:33 15 that are original. The difference is what *Apple Barrel*  
16 points out, is you don't take -- especially graphic work --  
17 you don't take it and chop it into little pieces and then  
18 say, 'Okay. This piece is' --

19 THE COURT: Yeah. Go on.

15:34 20 MR. BONHAM: -- 'this piece has been seen before.  
21 We don't consider this.'

22 We say, no, it's how you put all the pieces  
23 together; it's the entirety of the work. That's what *Apple*  
24 *Barrel* covered and that's what this case involves.

15:34 25 THE COURT: Say it again.

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1 MR. BONHAM: Okay.

2 THE COURT: You don't --

3 MR. BONHAM: We're saying you don't take a work and  
4 chop it into pieces and say, 'Okay. This kind of door has  
15:34 5 been used before. Don't consider it. This kind of stair  
6 has been used before. Don't consider it.' It's how you put  
7 the pieces together.

8 THE COURT: Is it your position, then, that all  
9 should not be given? Correct?

10 MR. ZUMMO: All of No. 6. Correct.

11 MR. BONHAM: Correct.

12 THE COURT: Okay. No. 7. Scènes à Faire.

13 MR. ZUMMO: I think we have a jury question on how  
14 to pronounce it, Your Honor.

15:35 15 THE COURT: How do you pronounce it in Texas?

16 (Off-the-record discussion)

17 THE COURT: Okay. Let's talk about -- Now we're on  
18 Page 13, Proposed Instruction No. 7. What is this? Do you  
19 need this?

15:36 20 MR. STROTHER: I do.

21 THE COURT: Do you agree that he needs it or  
22 doesn't he need it?

23 MR. ZUMMO: I don't think he needs it. I don't  
24 think we are harmed by a proper instruction on scènes à  
15:37 25 faire. I don't think it applies here.

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1                   The doctrine, Your Honor, in general, means --  
2     In fact, Mr. Bonham and I had a case in your court where  
3     this came up, as you might remember, a movie script case we  
4     had ten or twelve years ago.

15:37 5               THE COURT: Oh, yeah.

6               MR. ZUMMO: And I picked the example that I wish my  
7     client had never put --

8               THE COURT: Was that the Schwarzenegger case?

9               MR. ZUMMO: Yes. In his script he had a bar called  
15:37 10    "Kelly's Bar" and in the movie they had Kelly's Bar, and  
11    when he put his similarities together that was one of the  
12    things he picked up. And I think we ended up all agreeing  
13    Kelly's Bar is probably a scènes à faire, if you're going to  
14    have a detective story or downtown-type story, because it's  
15:37 15    pretty often you find a place called "Kelly's Bar".

16              Now, if you have a detective or police show,  
17    there's going to be a car chase. So, having a car chase,  
18    just in and of itself, is not evidence of --

19              THE COURT: What was the name of that movie?

15:38 20             MR. ZUMMO: The Sixth Day.

21              THE COURT: The Sixth Day. I went and got the  
22    movie later on.

23              MR. ZUMMO: That's where it comes in.

24              I know what Mr. Strother wants to argue on  
15:38 25    merger is -- there is only one way to do this and, if you

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1 say there is a couple of ways to do it, then it's scènes à  
2 faire, and I think that's how --

3 THE COURT: Yeah. What's your theory on why you  
4 needs this?

15:38 5 MR. STROTHER: Well, it comes straight from  
6 Professor Bachman's testimony regarding these are the way  
7 things are always done in this situation, and that scènes à  
8 faire. Straight from the Fifth Circuit case law, the scènes  
9 à faire doctrine excludes from protection expressions that  
10 are dictated by external factors, including industry demand  
11 and practice.

12 THE COURT: Now, where is it?

13 MR. STROTHER: That's the third paragraph, the  
14 first sentence.

15:38 15 THE COURT: Where is it? Down here is that case  
16 listed?

17 MR. STROTHER: Yes. *Engineering Dynamics*, Your  
18 Honor.

19 THE COURT: Oh. Yeah, 1994. 'Under the doctrine  
15:39 20 of scènes à faire copyright protection is denied" -- so  
21 you're saying denied -- "to those expressions that are  
22 standard stock or common to a particular topic or that flow  
23 necessarily or naturally from a common theme or setting.  
24 Furthermore, where a particular expression is common to the  
15:39 25 treatment of a particular idea, process or discovery, it is

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1 lacking in the originality that is required for copyright  
2 protection."

3 Now, you'd better explain what you just said,  
4 if you're going to do it at all.

15:39 5 Hang on. Then they go down... [Reading]

6 All right. Where does all that come from?

7 MR. STROTHER: That paragraph comes from a case out  
8 of the Second Circuit, Your Honor, called *Zalewski*.

9 THE COURT: "Scènes à faire excludes from  
10 protection expressions that are dictated by external  
11 factors, including industry demand and practice, regulations  
12 and other external design elements attributable to  
13 buildings, codes, topography, structures..."

14 All right. Go ahead. I have my own idea, but  
15:40 15 you tell me. Tell me what your objection is since you're  
16 objecting to it.

17 MR. BONHAM: Number one, since he's talking about  
18 protection is denied -- and this gets back down to if we're  
19 not going to instruct that --

15:40 20 THE COURT: Where does it say that, where it is  
21 denied?

22 MR. BONHAM: If you're saying protection is denied,  
23 then I think we have to come back to at least tell the jury  
24 the Court has already found that we have valid copyrights,  
15:40 25 these are protected works. The main thing is me saying

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1 "dictated by".

2 It's one thing, for example, if you have got  
3 something in The Woodlands -- if The Woodlands had a rule  
4 that said --

15:40 5 THE COURT: Where is "dictated by"? Where is that?

6 MR. BONHAM: Mr. Strother just read it in terms of  
7 dictated by -- Third paragraph, second line, first two  
8 words.

9 THE COURT: "Dictated by".

15:41 10 MR. BONHAM: Correct. If you're having something  
11 like in The Woodlands where they're saying the townhouses in  
12 this neighborhood have to be Georgian, they have to be two  
13 stories, no more than three bedrooms, something to where  
14 they tell you very much and they constrict what you're  
15:41 15 doing, okay, that's one thing.

16 It's another thing to just simply say, well,  
17 it's dictated by. And I don't think there is any evidence  
18 that anything was dictated by anything. So --

19 THE COURT: Okay. Now, this word at the  
15:41 20 beginning -- I'm sorry for cutting you off, but I am  
21 thinking.

22 "Under the doctrine of scènes à faire  
23 copyright protection is denied to those expressions..." You  
24 say you have got a problem with that?

15:41 25 MR. BONHAM: Yes.

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1 THE COURT: All right. I want to give you some  
2 idea as to where I am thinking -- I'm not there yet -- that  
3 maybe perhaps to allow -- if he thinks it's important, allow  
4 him to have a shot at that, but you have a concern about the  
15:42 5 word "denied". So, if I -- Again, I am listening to what  
6 you have to say, but I'm saying, if that's what he says,  
7 that he needs it as part of that defense, my inclination,  
8 probably, is to go that route, but I'd look to see if you  
9 want to tweak it a little bit where it doesn't blow out your  
15:42 10 portion of your case because he's getting that instruction.  
11 Or does it?

12 MR. ZUMMO: What Mr. Bonham is saying is we already  
13 have a ruling that we have a protectable copyright --

14 THE COURT: I understand that. But what --  
15:42 15 And you say you need that. Right?

16 MR. STROTHER: Absolutely. I think it's a -- Yes.

17 THE COURT: All right. I am just saying I am going  
18 to hold on that one. I will come back and look. See if  
19 both of you can work out something.

15:42 20 If he thinks he needs it as his affirmative  
21 defense, my inclination always is to give it to them.

22 But I understand, for instance, it now goes on  
23 where I might not be doing all of this -- There are scènes à  
24 faire -- For example, I very often do that neoclassical,  
15:43 25 government buildings, Colonial houses, modern -- I usually

## Charge Conference

1 don't go with all of that type of fluff after that. If you  
2 think you're entitled to it see if you can work it out.

3 Now, you may object to it, but at the bottom  
4 line -- and you need to listen to them, where if you want to  
15:43 5 modify it some if you think you need it. Because I don't  
6 hesitate to rule and, if you can't agreeing on anything, I  
7 am just going to rule on it.

8 MR. ZUMMO: Well, I am thinking what can we do with  
9 "denied".

15:43 10 THE COURT: If he thinks he has to have a shot at  
11 it, I think it would be a concern for the case on appeal to  
12 say, 'Well, he said he had to have this and you didn't even  
13 give him a shot or instruction on it.'

14 MR. ZUMMO: Yes, sir.

15:43 15 THE COURT: Then, of course, the circuit could say,  
16 'Well, he could have argued it.'

17 But the question is does he need, at least, an  
18 instruction before he can argue. Because if he starts  
19 arguing it and you get up to object, then I am going to have  
15:44 20 to make a ruling in the middle of summation.

21 All right. That's why we take a break.

22 Now, No. 9 is what we talked about already.  
23 Correct? We've already done 9.

24 MR. STROTHER: Did you skip 8? That may have  
15:44 25 been --



## Charge Conference

1 THE COURT: 8 is a short one. Is it?

2 MR. STROTHER: Yes.

3 THE COURT: "Merger. When an idea can be expressed  
4 in very few ways, copyright law does not protect that  
15:44 5 expression because doing so would confer a de facto monopoly  
6 over the idea. In such cases, 'idea' and 'expression' are  
7 said to be merged."

8 MR. ZUMMO: Here, Your Honor, we have already got a  
9 summary judgment that we own a valid copyright, that the  
15:44 10 copyright is valid. If what he's saying is that copyright  
11 law does not protect that expression -- You know, again,  
12 unless we go back and get an instruction that we have  
13 already been -- The court has already ruled they have valid  
14 copyrights. I think this opens the door to really confuse  
15:45 15 the jury.

16 MR. STROTHER: I disagree.

17 First of all, the United States Supreme Court  
18 in *Feist* makes it clear -- and I am going to paraphrase, but  
19 I think I am hewing close to the language -- not all the  
15:45 20 elements in a valid copyright are protectable.

21 THE COURT: Well, we know that generally.

22 MR. STROTHER: Right. When this says copyright law  
23 does not protect that expression, it's not attacking the  
24 validity of the copyright. It's saying that there are  
15:45 25 things in the design that are simply not protectable even

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1     though they're copyrightable.

2                     This is a quote from the Fifth Circuit about  
3     what the merger doctrine is.

4                     THE COURT: You cite a case down here, F.3d --

15:45 5                     MR. STROTHER: Yes. That's a Fifth Circuit case.

6                     THE COURT: That's an old case, though, relatively,  
7     isn't it?

8                     MR. STROTHER: It is from 1994.

9                     THE COURT: 1991 -- It's amazing that Federal 3d.  
15:45 10     went in that long ago.

11                    MR. ZUMMO: Can I just confer with Mr. Bonham just  
12     a second?

13                    THE COURT: Absolutely.

14                    MR. ZUMMO: I think the difference here, Your  
15:46 15     Honor -- this is the difference between scènes à faire  
16     versus merger.

17                    Scènes à faire is something courts consider as  
18     part of the substantial similarity or probative similarity  
19     case. But the merger doctrine, as I understand it, only  
15:46 20     applies to say is this a valid copyright, and that's  
21     something that's already been decided.

22                    THE COURT: I got it. Let's move on.

23                    We now jump over 9 and see what the next one  
24     is.

15:46 25                    "Substantial Similarity".

## Charge Conference

1 MR. BONHAM: And here we have again -- we have  
2 dueling instructions. The first five perhaps are what we  
3 think the instruction should be. And, again, I think this  
4 instruction largely is drawn from what you did in *Abshire*  
15:46 5 many years ago, and then subsequently it's been done in a  
6 couple of other cases in the Southern District. And then  
7 you have, essentially, we say toe-may-to; he says  
8 toe-ma-toe.

9 THE COURT: Okay. These summaries, let me read  
15:47 10 them.

11 That's a pretty strong -- it ends on a pretty  
12 strong note. I'm now going to read the defense proposed  
13 instruction.

14 I am looking at: "...substantially similar if  
15:48 15 an ordinary reasonable person would find the total concept  
16 and feel of the two works to be substantially similar.  
17 Substantial similarity only applies for similarity that  
18 exists between the protected elements of a work and another  
19 work.

15:48 20 "Copying is shown through a detailed  
21 side-by-side comparison of the works. Therefore, to  
22 determine whether two works are substantially similar you  
23 must make a direct side-by-side comparison between the  
24 original architectural work and the copying. In determining  
15:49 25 substantial similarity you should compare only the

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1 protectable or copyrightable portions of the two works  
2 copyrighted."

3 Okay. What's the problem with theirs?

4 MR. BONHAM: Again, first is *Apple Barrel*. *Apple*  
15:49 5 *Barrel* is directly on point on this, that you don't break it  
6 into individual pieces; you look at the whole.

7 Secondly, when he talks about, looking at the  
8 very last line --

9 THE COURT: No. I am talking about the first  
15:49 10 paragraph.

11 MR. BONHAM: First paragraph.

12 THE COURT: What's wrong with the first paragraph?

13 MR. BONHAM: Up through Footnote 63, that's fine.

14 The last sentence of that is the problem. It  
15:49 15 says: "Substantial similarity only applies for similarity  
16 that exists between the protected elements of a work and  
17 another work."

18 THE COURT: All right. Now, look. I am not  
19 touching my paper. Okay?

15:49 20 Take a look what I have here just in the first  
21 one. Okay? I have that blocked off already. I am reading  
22 it. I am looking at it. Not being attuned to that, it's  
23 already blocked off. Also, we said many times copying, on  
24 its own, is not legally actionable.

15:50 25 Again, take a look. I haven't touched the

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1 paper. I have that blocked there. Some of this kind of  
2 rings true. I haven't gone as compared to yours. But keep  
3 in mind, from your point of view, the safer thing to do is,  
4 if you can go with his, it pulls the possibility of any  
15:50 5 objection later on.

6 But I'm not saying I am avoiding it. Again,  
7 some of yours I have marked down. And that's why we're  
8 going to take a break, to see if you can narrow it down.

9 All right. What about the last paragraph?

15:50 10 MR. BONHAM: Again, the first sentence is accurate.  
11 The second sentence accurate. It's the third one I have got  
12 a problem with, because it's basically saying you chop it  
13 into pieces and just look at whether the pieces are the  
14 same, and that's not what you do in a copyright case.

15:51 15 THE COURT: Okay. Take a look at this. I'm not  
16 saying you're going to go with what they have, but if they  
17 go with what you have, you see where they want to chop it  
18 up. See if it hurts you.

19 That's why we take a break. And I ask for how  
15:51 20 much time you need because we need some also.

21 The last thing I want to do -- and I will do  
22 it if I have to -- come and say, 'That's granted,' 'That's  
23 granted,' 'That's out.' 'I'm going all with No. 10 and your  
24 tendered instruction for the defense is denied.' Or 'The  
15:51 25 Plaintiff's is denied. We go with everything from the

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1 Defendant.'

2 It's cut and paste, but it's the safer thing  
3 to do for you, to see if you can chop it up. Otherwise, I  
4 will do it, but I may not use my brackets as much as I need  
15:51 5 to.

6 MR. BONHAM: The good news on this is that, other  
7 than one toe-may-toe/toe-ma-toe instruction, it's downhill  
8 from here.

9 THE COURT: That's all right. I like going  
15:52 10 downhill.

11 Let's see. What's the next one? Defendant  
12 objects to No. 11. Why?

13 MR. BONHAM: Because there is already summary  
14 judgment that says no "innocent infringement" defense.  
15:52 15 Judge Atlas has said there's no -- We have got summary  
16 judgment on it.

17 MR. STROTHER: I have a problem. Mr. Bonham is  
18 correct; that's what the summary judgment says. I think  
19 that's not what it was intended to say. And I'm not saying  
15:52 20 that Judge --

21 THE COURT: Now, I haven't read it.

22 MR. STROTHER: Okay.

23 THE COURT: The question is do you need to do it at  
24 all if it's already the law of the case? Again, notice I  
15:52 25 haven't gone down and read the thing. I am just saying,

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1 listening to the argument, you say it's already been done;  
2 so, the question is why do we go it again?

3 MR. STROTHER: You may be able to direct me to --  
4 It may be that, after you react to what I am about to say, I  
15:52 5 withdraw this. I am uncertain.

6 THE COURT: It always helps to let me read it  
7 first. Right?

8 The Defendants object to No. 11.

9 "A copyrighted work need not contain a  
15:53 10 formal" -- ah! okay -- "copyright notice to be protected.  
11 However, if a copyright notice appears on a copy of the work  
12 to which the Defendants had access, then you shall give no  
13 weight to any defense or claim of innocent infringement.

14 "In this case the Court has found that a  
15:53 15 copyright notice appeared in copies of it to which the  
16 Defendant had access. The Defendant cannot assert a defense  
17 of innocent infringement. You are, therefore, instructed to  
18 give no weight to any defense or claim of innocent  
19 infringement."

15:53 20 Now, that's a lot of instruction from the way  
21 I do jury instructions, that last paragraph.

22 MR. BONHAM: Where we are on this is, again, you  
23 have to kind of jump to the end because Mr. Strother has  
24 submitted a question on innocent infringement which, again,  
15:53 25 based on the fact that Judge Atlas gave a summary judgment

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1 on his affirmative defense of innocent infringement.

2 THE COURT: "Therefore, Plaintiff is entitled to  
3 summary judgment on innocent infringement as an affirmative  
4 defense."

15:54 5 MR. BONHAM: Correct. So, if he's going to get  
6 it -- I don't think he should get an issue on something that  
7 we have already gotten a summary judgment on, but, if he is,  
8 then we need this instruction. I don't think we need this  
9 instruction because I don't think he gets to add the issue.

15:54 10 MR. STROTHER: May I explain, in one minute, why I  
11 think I am entitled to it?

12 THE COURT: Yes, sir.

13 MR. STROTHER: So, this case involves five  
14 projects. Right? Two of them are Nagle and Mount Vernon  
15:54 15 and those are the ones that both experts testified about.  
16 They're the ones that there's evidence that Urban Living  
17 gave Cameron Architects Preston Wood plans to -- I think  
18 that's correct -- Preston Wood plans to create work from.  
19 The other three, there is a different route that Plaintiff  
15:54 20 gets defense to.

21 So, we pled innocent infringement, and  
22 Plaintiff moved for summary judgment and claimed that  
23 because we had notice of the copyright on the Mount Vernon  
24 and Nagle plan that we weren't entitled to innocent  
15:55 25 infringement as a matter of law. That's the evidence they



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1 have put forth.

2 And Judge Atlas said, 'Yeah. You're right.  
3 That's what the law says. If you have notice of the  
4 copyrights you can't claim to be an innocent infringer,' and  
15:55 5 she said no innocent infringement.

6 However, I don't think that she intended to  
7 and I'm not sure she had the power to grant innocent  
8 infringement as to the other three because Plaintiffs put  
9 forth no evidence that there was any access or notice to the  
15:55 10 copyright notices on the other three.

11 THE COURT: So, you say if any of this applies to  
12 certain plans and not others?

13 MR. STROTHER: Yes, Your Honor.

14 MR. BONHAM: Two reasons why this is wrong.

15:55 15 First, innocent infringement is an affirmative  
16 defense. We filed a no-evidence motion for summary  
17 judgment. I then came back and said, 'And on top of that,  
18 here's the evidence that they had access to.' They didn't  
19 put on any evidence of innocent infringement.

15:55 20 So, saying we didn't put on any evidence -- It  
21 was his burden and she's granted summary judgment.

22 Secondly, the evidence that's come in in this  
23 case -- "yes" on Nagle, "yes" on Mount Vernon -- there is no  
24 question because the plans are in the record. But,  
15:56 25 additionally, they have stipulated to access to the plans

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1 that are at issue on Patterson and EaDo where we had notices  
2 on everything.

3 THE COURT: I have got a question here. Do you  
4 need Instruction No. 11 based upon the history of the case?

15:56 5 MR. ZUMMO: Only if he gets his question on the  
6 affirmative defense.

7 THE COURT: The question later on?

8 MR. ZUMMO: Yes.

9 MR. BONHAM: Correct. If he doesn't get that, we  
15:56 10 don't need it.

11 THE COURT: Hang on. I am going to put this on  
12 hold. I'm going put "See Question No." -- what? --

13 MR. BONHAM: 14.

14 THE COURT: -- "Question 14."

15:56 15 Let's keep moving because, like you say, we're  
16 close to the end.

17 MR. BONHAM: Okay. We have worked out 12.

18 MR. STROTHER: I think we have.

19 MR. BONHAM: We have worked out 12. There is going  
15:57 20 to be some language added to it and we'll get that to you.

21 Okay. And then here's, like I say, the last  
22 toe-may-toe/toe-ma-toe. This is a big one.

23 What we have got is -- essentially, we have  
24 submitted 13, 14, 15 and 16. The form of this is basically  
15:57 25 from the form that you gave in *Kevin Young v. Abshire*, that

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1 Judge Stacy gave in *Kipp Flores v. Hallmark* and that  
2 Judge Werlein gave in the *Hewlett v. Frontier* case.

3 THE COURT: Any appellate record on any of those  
4 cases?

15:57 5 MR. BONHAM: Yes, both. In *Hallmark* that was  
6 affirmed with the Court complimenting Judge Stacy. And they  
7 also affirmed the *Frontier* one. And, as you know, in  
8 *Abshire*, shortly after you ruled on their post-judgment  
9 motions, that case settled; so, there is no appellate record  
15:57 10 on that one.

11 But, again, these are very standard  
12 instructions in copyright cases. The problem is that  
13 because you have to go through -- the statute has, first,  
14 the plaintiff has to prove gross revenues, what are gross  
15:58 15 revenues. Then the defendant proves deductible expenses,  
16 what are deductible expenses. If you're going to go with  
17 overhead, there's a dance that you have to do under  
18 copyright law, and then you have got the apportionment  
19 issue.

15:58 20 And I think, to sum up, the way we have set  
21 forth here is accurate under the law. I think that the  
22 Defendants' instruction tries to collapse things down way  
23 too far.

24 THE COURT: All right. Now, for example -- I don't  
15:58 25 give examples, generally, but it may be necessary because

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1 this is a complex theory. It says: "For example" -- I am  
2 in the third paragraph, third sentence up -- "For example,  
3 the value of a building constructed in violation of an  
4 architectural work copyright can be evidence of gross  
15:58 5 revenue even when that building has not been sold."  
6 Correct?

7 MR. BONHAM: Correct. We use that just because,  
8 again, that is an accurate statement of the law. It's being  
9 done to explain the previous sentence, the idea that gross  
15:59 10 revenues is not just cash; it's any value. And the example  
11 is proven by the cases cited in Note 13.

12 THE COURT: Now, "Upon proof of gross revenues, the  
13 burden then shifts to the Defendants to prove what expenses,  
14 if any, should be deducted from the gross revenues to  
15:59 15 establish net profit. If the Defendants fail to adduce  
16 competent evidence of expenses, the gross revenue figure  
17 stands as the measure of profits."

18 MR. BONHAM: That's right out of the *Hewlett* case.

19 MR. STROTHER: And you can tell by the use of the  
15:59 20 word "adduce" -- That's not a word that should appear in a  
21 jury charge.

22 MR. ZUMMO: Thank you. I keep telling him.

23 MR. STROTHER: There are some things that are in  
24 these four instructions that are correct statements of law  
15:59 25 and there are some that are incorrect. There's some that I

*Charge Conference*

1 have gone and looked at some of the cases and the court has  
2 said that and I still think the court is wrong. There are  
3 some things that are nonsensical that some courts have been  
4 tricked into saying.

16:00 5 These instructions, together, conflate direct  
6 expenses with overhead, and there is a difference at their  
7 core between what should be considered direct expense and  
8 what should be considered overhead.

9 THE COURT: I am going to get to it. You submit  
16:00 10 No. 17 as a replacement. Because we need some instruction  
11 on this stuff. Right?

12 MR. STROTHER: Well, yes. And No. 17, Your Honor,  
13 is 100 percent the Ninth Circuit pattern charge.

14 THE COURT: Thank you. Now you're breaking it  
16:00 15 down. I haven't looked at the Ninth Circuit pattern. I  
16 will ask you now. Does it break down all these elements  
17 that they're talking about with individuals?

18 MR. STROTHER: Not as granulated as they did, but  
19 yes.

16:00 20 THE COURT: Okay. Let me just take a quick look.  
21 Profits, overhead, expenses. We've got that. We pulled the  
22 Ninth Circuit pattern.

23 And here's 16. "...who has profits from  
24 copyright infringement is allowed to prove that a portion of  
16:01 25 the profits resulted from factors other than an infringer

## Charge Conference

1 who has" -- claiming you. Right?

2 MR. STROTHER: Yes, Your Honor.

3 THE COURT: "...who has profits from copyright  
4 infringement is allowed to prove that a portion of the  
16:01 5 profits resulting from factors other than the acts..."

6 Okay. Now let's see what No. 17 says. Okay?  
7 Look at 17. Where did you get that from?

8 MR. STROTHER: The Ninth Circuit.

9 THE COURT: Ninth Circuit. I am going to read the  
16:01 10 whole thing because, usually -- if it sums it up, let's see  
11 what it says. I do better orally anyhow than I do in  
12 writing.

13 "The copyright owner is entitled to any  
14 profits of the Defendants attributable to the infringer. It  
16:02 15 may not include, in award of profits, any amount that you  
16 took into account to determine actual damages." Okay. And  
17 that's spelled out later on. Right?

18 MR. STROTHER: There are no actual damages at issue  
19 for the jury; so, that would have to be struck.

16:02 20 THE COURT: What do you strike?

21 MR. STROTHER: That entire sentence. "You may not  
22 include" --

23 THE COURT: Okay. All right. "You may make an  
24 award of the Defendants' profits only if you find that the  
16:02 25 Plaintiff showed a causal relationship between the

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1 infringement and the Defendants' profits." A causal  
2 relationship.

3 "The Defendants' profit is determined by  
4 deducting all expenses from the Defendants' gross revenue.

16:02 5 The Defendants' gross revenue is all of the Defendants'  
6 receipts from the sale of a" -- it should be, what,  
7 "buildings"? "Of buildings".

8 MR. STROTHER: "Building".

9 THE COURT: -- "of a building."

16:03 10 Let's go again. "Defendant's gross revenue is  
11 all of the Defendant's receipts from the sale of a building  
12 associated with the infringement. The Plaintiff has the  
13 burden of proving the Defendants' gross revenue by a  
14 preponderance of the evidence."

16:03 15 Now, shift. "Expenses are all operating  
16 costs, overhead costs and production costs incurred in  
17 producing the Defendants' gross revenue. The Defendant has  
18 the burden of proving the Defendants' expenses by a  
19 preponderance of the evidence." There is the shift, right,  
16:03 20 to the other side?

21 "Unless you find that a portion of the profit  
22 from the sale of a building containing or using the  
23 copyrighted work is attributable to factors other than use  
24 of the copyrighted work, all of the profit is to be  
16:04 25 attributable to the infringement. The Defendant has the

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1     burden of proving the portion of the profit, if any,  
2     attributable to factors other than copying the copyrighted  
3     work."

4                     Okay. What's wrong with that?

16:04 5             MR. BONHAM: All right. Let's start at the top.

6                     First, the idea of a casual -- causal  
7     relationship between the infringement and Defendants'  
8     profits -- As set forth in our trial brief that I filed this  
9     morning, this gets into the distinction between direct  
16:04 10    profits and indirect profits.

11                    Judge Ellison addressed this in the *Interplan*  
12    *Architects* case where you're talking about direct profits.

13                    For example, Cameron Architects' revenues for  
14    doing infringing plans, those are direct profits. We don't  
16:04 15    have to prove anything else.

16                    Similarly, Urban Living's profits that they  
17    made as commissions on the sale of the infringing houses,  
18    those are direct profits.

19                    The proof of the causal relationship is only  
16:05 20    applicable where you're talking about indirect profits.

21                    THE COURT: So, you're saying --

22                    MR. BONHAM: I am saying this is incorrect. This  
23    is not a correct statement of the law.

24                    THE COURT: Is not. Because it's not applicable to  
16:05 25    this case --



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1 MR. BONHAM: Correct.

2 THE COURT: -- or that it's not applicable to the  
3 law?

4 MR. BONHAM: I think it overstates it because you  
16:05 5 do not have to prove a causal relationship where it's direct  
6 profits because the proof of that is self-effectuated.

7 Secondly, "The Defendants' profit is  
8 determined by deducting all expenses from the Defendants'  
9 gross revenue." Not accurate. You prove it by proving the  
16:05 10 expenses associated with the project. This is set forth in  
11 our Instruction No. 14.

12 THE COURT: Keep going.

13 MR. BONHAM: Okay. "Defendants' gross revenue is  
14 all Defendants' rights." It's not rights. It's any value.  
16:05 15 By using the word "rights" you're implying that it's got to  
16 be cash. It doesn't have to be.

17 "From the sale of a building". No. It's  
18 from -- as we put it, I think it's from creating the  
19 infringing copy or from selling the infringing copy. This  
16:06 20 instruction, for example, would let Mr. Cameron off the hook  
21 for his -- in this way.

22 "Defendant has the burden of proving gross  
23 revenues by a preponderance of the evidence." That's, of  
24 course, correct.

16:06 25 "Evidence of all operating costs, overhead

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1 costs and production costs incurred in producing the  
2 Defendants' gross revenue." That's not a correct statement  
3 of the law.

4 THE COURT: In this case or generally?

16:06 5 MR. ZUMMO: Generally. The distinction, Your  
6 Honor --

7 THE COURT: What's the date of this? It's 2017.  
8 Okay. What I was doing, for the record, looking at the date  
9 of the Ninth Circuit pattern.

16:06 10 MR. BONHAM: On this one, I think, the *Powell v.*  
11 *Penhollow* case, which is a Fifth Circuit case which talks  
12 about -- also in the -- It's discussed indirectly in the  
13 *Hewlett* case, again Fifth Circuit 2015 case, that talks  
14 about what you do.

16:06 15 But, again, when you're talking about, for  
16 example, overhead costs, what are overhead costs? There's a  
17 special way you have to do it under 504(b) to do overhead.  
18 It's not just anything you call overhead. First, you have  
19 got to identify what categories of expenses contributed to  
16:07 20 the production or sale of the works in question. And then  
21 you have got to promulgate an appropriate formula -- which  
22 there's been no evidence in this case -- and then you have  
23 got to accurately apply it. You can't just simply go in and  
24 instruct -- just say "overhead costs" in general.

16:07 25 "The Defendant has burden of proving..."

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1 That's okay.

2 The allocation instruction is generally okay,  
3 but, again, it leaves out a big part of the story.

4 THE COURT: Which is?

16:07 5 MR. BONHAM: The intertwinedness doctrine; and that  
6 is, if all of these other factors are so balled up that you  
7 can't separate out what is attributable to the infringement  
8 and not, then you have to give it to the plaintiff. And,  
9 again, that's from the *Hewlett* case.

16:08 10 The other thing that's not in here which is in  
11 the other ones and which I have had you give before is that  
12 on all of these, if there is any doubt, the burden -- excuse  
13 me -- any doubt as to expenses or factors allocable, you  
14 resolve those in favor of the Plaintiff. And that is from  
16:08 15 the Ninth Circuit. That's from the *Eales* case.

16 THE COURT: What's your response?

17 MR. STROTHER: There's a lot to respond to there.

18 I found things that I agree with him on.

19 I think there was the issue that, if it's  
16:08 20 limited to just rights from the sale a building, that  
21 doesn't include Cameron Architects. So, that would have to  
22 be adjusted.

23 I think that the way the third paragraph is  
24 worded -- "The Defendants' profit is determined by deducting  
16:08 25 all expenses from the Defendants' gross revenue" -- is

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1 misleading when we're reading it quickly. What the Ninth  
2 Circuit committee was doing -- it has this sentence, then  
3 broken down into definitions in the next two paragraphs.  
4 Defendants' profit would be the paragraph right behind it.  
16:09 5 And then "expenses" it defines as operating costs, overhead  
6 costs and production costs incurred in producing the  
7 Defendants' gross revenue.

8 So, maybe we could tighten it up and tie it  
9 better, but, other than that, I disagree with him. I think  
16:09 10 that this is a correct statement of the law and it's  
11 captured in all these different cases and it doesn't need to  
12 be further fleshed out.

13 THE COURT: All right. Let's move to 18. Any  
14 problem with that?

16:09 15 What's your objection to "Integrity of  
16 Copyright Management Information"?

17 MR. BONHAM: I think the only disagreement we have  
18 is that, if you look on Page -- actually, this is on the  
19 extra one, on Page 2 of that.

16:09 20 THE COURT: Yeah, I've got it. Which is what?

21 MR. BONHAM: This is the Defendants' --

22 THE COURT: Well, this is submitted by the  
23 Plaintiff. Are you withdrawing it?

24 MR. BONHAM: No. What he's done is he's just  
16:09 25 simply taken what is in the file version and he's adding one

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1 paragraph.

2 THE COURT: Oh. I see. I see what you're doing  
3 here.

4 MR. BONHAM: Correct.

16:10 5 THE COURT: In other words -- Hold it. See...  
6 What would you call this?

7 MR. STROTHER: Alternate instruction.

8 THE COURT: Alternate Instruction 18. All right.  
9 Let me take a look at this.

16:10 10 MR. STROTHER: Before you do, Your Honor, to be  
11 clear, I am going to have an objection to this one way or  
12 the other. My objection is going to be that they don't have  
13 evidence to support an instruction or question on this at  
14 all.

16:10 15 THE COURT: What's this about?

16 MR. BONHAM: This deals with DMCA 1202(b) and we  
17 filed a trial brief on that. It was in our trial brief.  
18 We've also filed a supplemental that really fleshes it out.

19 Under DMCA 1202 you cannot take someone's --  
16:10 20 whether it's copyright management information, which can be  
21 the name, the copyright notice, the terms and conditions --  
22 you can't take that off of a copy. And, again, we'll talk  
23 about what a "copy" is in a second. If you do it  
24 intentionally and you do it with the -- you know, and it  
16:11 25 facilitates or encourages or otherwise assists infringement,

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1 then it violates 1202.

2 Now, we think the evidence in this case is  
3 absolutely clear. They knew they were not supposed to  
4 remove our CMI from our copies. And, again, a copy is not  
16:11 5 just a reproduction that they had. It's their creation of a  
6 derivative work that counts as a copy. If they removed it  
7 and they weren't supposed to and they knew about it -- which  
8 they did because it was in the contract, they were on actual  
9 notice that they were not supposed to do this and if they  
16:11 10 did it -- and, again, this is what Judge Atlas already dealt  
11 with on denying their motion for summary judgment -- If  
12 that's the case, then each time they violated, you know,  
13 1202(b) that's a violation.

14 THE COURT: All right. How much is that? That's  
16:12 15 where you've got a lot of money riding on it. Right?

16 MR. BONHAM: Could very well be, and that's what  
17 we're talking about here.

18 Now, the difference between what we're  
19 proposing and what they're proposing is they're wanting to  
16:12 20 add this last paragraph on this replacement.

21 THE COURT: What you're doing, I think, the  
22 Plaintiff -- you're tracking just the language of the  
23 statute.

24 MR. BONHAM: Yes, Your Honor.

16:12 25 THE COURT: Now, what's the difference between what

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1 they have and you have?

2 MR. STROTHER: There is an additional instruction  
3 there about what is a violation, what is an act, that the  
4 statute would grab.

16:12 5 THE COURT: Hang on one second. Okay. This last  
6 paragraph. Right?

7 MR. STROTHER: Yes, Your Honor.

8 THE COURT: This is "add", a-d-d, question mark.  
9 Right?

16:12 10 MR. STROTHER: Yes, Your Honor.

11 So, what the statute, first of all, requires  
12 is that someone intentionally and with knowledge publish or  
13 distribute an infringing -- not infringing work -- a work  
14 that has had its copyright management information altered or  
16:13 15 removed. So, we're going to be arguing that there's been no  
16 evidence of any alteration or removal.

17 If the Court moves past that and wants to give  
18 the question and the instruction -- the Court has let in the  
19 evidence of page views, which is what Mr. Ramani was being  
16:13 20 cross-examined about.

21 The case law is very clear about this, that  
22 the number of times someone looks at something online does  
23 not constitute a violative act under DMCA. It's been in  
24 front of several courts and they all say, no, that would  
16:13 25 lead to -- that's a perversion of the language and it would

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1 lead to a windfall for plaintiffs.

2 What this means is, when someone does the  
3 actual violative act -- which in that case would be actually  
4 uploading the alleged violative work -- that that equals a  
16:13 5 violation. But the Court has allowed Plaintiff to put in  
6 evidence of 20,000 views and the jury is going to be  
7 distracted by that. So, in this paragraph is an instruction  
8 that the jury is not to consider that information when  
9 answering a question about how many times the act had been  
16:14 10 violated.

11 MR. BONHAM: The case he's referring to is called  
12 *McClatchy*, and in *McClatchy* what they -- and this is in my  
13 trial brief that I filed this morning.

14 THE COURT: Yeah. We've got them all in the back.

16:14 15 MR. BONHAM: Okay. With *McClatchy* is that the  
16 basis of it is saying each violation is somehow ambiguous.  
17 It's not. Each violation means each violation. The court  
18 then went on to say, 'So, therefore, I am interpreting each  
19 violation to mean,' you know, 'each violative act committed  
16:14 20 by the defendant.'

21 As I explained in my trial brief, even under  
22 that, I think, we're still -- I don't believe you can then  
23 say page views don't count, because what's a page view?  
24 It's their computer distributing the image downstream. Now,  
16:14 25 that's different from *McClatchy*. *McClatchy* was a wire



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1 service case. That's when they put it up on the wire. It's  
2 not how many people are grabbing it down.

3 The bigger question, though, and the more  
4 fundamental one is -- In the Fifth Circuit it is absolutely  
16:15 5 clear that when a statute is unambiguous you apply it as  
6 written even when that results in something you might not  
7 like.

8 You have seen this in DMCA cases before and  
9 you had what were called -- for example, we call it the  
16:15 10 "textile secret" line of cases. Mr. Strother tried to get  
11 Judge Atlas to go with those, just like Judge Ellison before  
12 and just like the Third Circuit in the *Murphy* case. They  
13 said no because the statute is clear we're not going to then  
14 draft extra language onto it.

16:15 15 THE COURT: All right. Let's look at the next one.  
16 No. 19. Any problem?

17 MR. BONHAM: On this one we're actually moving for  
18 a directed verdict and Mr. Strother is not going to -- does  
19 not dispute that. So that's...

16:15 20 THE COURT: So, the Plaintiff is granted a judgment  
21 as a matter of law?

22 MR. BONHAM: Correct, on vicarious.

23 THE COURT: On that one issue?

24 MR. STROTHER: Sure.

16:16 25 THE COURT: Okay. That's granted. We have that

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1 noted.

2 All right. "Contributory Infringement".

3 Anything right there or not?

4 MR. STROTHER: I object to that instruction and the  
16:16 5 questions that go along with it.

6 THE COURT: Instruction No. 20. "The Defendant" --  
7 Well, where is that? "The Defendant can also be liable for  
8 infringement committed by another by intentionally inducing  
9 or encouraging direct infringement."

10 MR. STROTHER: That cites to the *Grokster* case, and  
11 that's a very small piece of *Grokster*. But that's not my  
12 main argument. My main problem with this is I don't  
13 understand what additional evidence there is that would get  
14 a "Yes" answer --

15 THE COURT: Where is it? What's the evidence of  
16 that?

17 MR. STROTHER: And who? By who?

18 THE COURT: I am saying, Plaintiff, what's the  
19 evidence?

20 MR. ZUMMO: We have Mr. Ramani giving our work to  
21 Mr. Cameron and directing him or asking him to use it to  
22 make copies.

23 MR. BONHAM: To answer a little differently, you  
24 have got Urban Living providing the materials to Cameron and  
16:17 25 inducing him to create them. So, we believe Urban Living

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1 is, therefore, contributorily liable for what Cameron did.

2 Similarly, because, in their interrogatory,  
3 the Defendants admitted that they created the marketing  
4 plans they put up by using Cameron's plans. So, therefore,  
16:17 5 Cameron is as --

6 THE COURT: You're saying that's not in the case?

7 MR. STROTHER: I don't believe what he just said is  
8 what the evidence shows. And, right, I don't think that  
9 what Mr. Zummo said is significantly enough to warrant a  
16:17 10 separate question about contributory infringement.

11 THE COURT: Got it.

12 No. 21. Those are just -- What's all that?

13 MR. BONHAM: That's just instructions, the short  
14 forms of everything that are going to be in the actual jury  
16:18 15 questions.

16 And the only one is the last one.

17 THE COURT: Mount Vernon?

18 MR. BONHAM: No. No. Defendants' proposed  
19 additional. It's italicized.

16:18 20 THE COURT: Oh. Proposed additional.

21 Deductible expenses, all operating costs,  
22 overhead costs, production costs. Okay. Now, don't we have  
23 an instruction one way or another?

24 MR. STROTHER: We might. Yes.

16:18 25 THE COURT: One way or another.

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1 MR. ZUMMO: One way or another.

2 MR. BONHAM: So, I don't think it needs to go here.

3 THE COURT: All right. Now let's look at the  
4 questions as to the form only. Okay?

16:18 5 I understand you say it doesn't waive any of  
6 your rights to object as to what's in evidence, but which  
7 one of these questions do you object --

8 Now, by the way, this is -- any of these  
9 predicated?

16:19 10 MR. STROTHER: Some, yes.

11 THE COURT: Any of these questions predicated or  
12 are they freestanding?

13 MR. STROTHER: Further down the list some of them.

14 THE COURT: They are predicated. Okay.

16:19 15 I am looking here. Which ones -- Question  
16 No. 1, No. 2, submitted by the Plaintiff. Which ones do you  
17 object to for any reason, except that there may not be any  
18 evidence or whatever?

19 MR. STROTHER: Okay.

16:19 20 THE COURT: Which one do we look at as --

21 MR. STROTHER: No. 6 has a difference between  
22 Plaintiff's and Defendant.

23 THE COURT: That's what I want to see.

24 MR. STROTHER: And No. 8 does.

16:19 25 THE COURT: No. 6 is what?

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1 MR. STROTHER: So, this one, Your Honor, it asks  
2 the question that we all agree should be asked: What's the  
3 percent of profit due to factors other than infringement?

4 And the only difference between Plaintiff's  
16:19 5 and Defendants' submission is that Plaintiffs say what  
6 percentage were attributable to factors other than  
7 copyrighted work, and I ask what percentage is attributable  
8 to factors other than the protected portions of the  
9 copyrighted work.

16:20 10 MR. BONHAM: I don't believe that's an accurate  
11 statement of the law. The one to look at is *Hewlett v.*  
12 *Frontier Homes*.

13 MR. STROTHER: I wish I could take you on voir dire  
14 because how could that not be a correct statement of the  
16:20 15 law? You can't get someone's profits from unprotected  
16 portions.

17 MR. ZUMMO: Look at Section 504(b). The statute  
18 says "Elements of profit attributable to factors other than  
19 the copyrighted work." So, our proposed instruction tracks  
16:20 20 the statute in that regard exactly.

21 THE COURT: And your position is "...were  
22 attributable to factors other than protected portions."  
23 Right?

24 MR. STROTHER: Correct.

16:20 25 THE COURT: Where did you get that language? Or

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1 you say that has to be the rational way of looking at it?

2 MR. STROTHER: Mr. Strother -- Justice Strother  
3 saying that that's the rational way to look at that.

4 MR. BONHAM: We object to that.

16:21 5 THE COURT: All right.

6 MR. BONHAM: It's the same -- 8 is the same issue.

7 MR. STROTHER: Exactly.

8 THE COURT: Hang on. 504(b). All right. You're  
9 saying 504(b) says this. Right?

16:21 10 MR. BONHAM: Yes, sir.

11 THE COURT: Other than the protected portions. All  
12 right.

13 MR. STROTHER: The next one we have a disagreement  
14 on, Your Honor, is No. 9.

16:21 15 THE COURT: Right.

16 MR. STROTHER: This is similar to the 6 and 8  
17 questions because there's just one tiny difference. The  
18 statute -- the DMCA statute requires that the Defendant have  
19 altered or removed or published things that have been --

16:21 20 MR. BONHAM: We'll go with your --

21 MR. STROTHER: Sorry about that.

22 THE COURT: You will go with the Defendants'  
23 suggested question?

24 MR. BONHAM: We'll go with the Defendants'.

16:21 25 THE COURT: Okay. No. 10.

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1 MR. STROTHER: No. 10. This question, Your Honor,  
2 is like the instruction that I am -- No. 18, the alternate  
3 instruction regarding the number of page views and what  
4 constitutes a violative act. So, we have crafted from that  
16:22 5 case law an addition to the question.

6 THE COURT: Now, No. 10 right now for Plaintiff:  
7 "For each project on which you have answered 'Yes' in  
8 Question No. 9 how many times did Urban Living do so?"

9 And your position is "intentionally". Right?

16:22 10 MR. STROTHER: "Knowingly and intentionally".

11 THE COURT: "Knowingly and intentionally". That's  
12 the difference.

13 MR. STROTHER: That's the difference in that  
14 question, yes, and --

16:22 15 THE COURT: But then you have to keep going with  
16 your instruction. That's the basic ruling that needs to be  
17 made if you can't work it out.

18 MR. BONHAM: Again, our objection to it in  
19 Question 10 is that all this is covered by the instruction  
16:22 20 on, you know, protection of the integrity of copyright  
21 management information. You don't put instructions in the  
22 questions. That's what instructions are for.

23 MR. ZUMMO: So, that's an objection to the form as  
24 proposed.

16:23 25 THE COURT: 11, 12.

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1 MR. BONHAM: Again, 11 is moot because we have got  
2 a directed verdict on that.

3 THE COURT: Okay.

4 MR. ZUMMO: 12 is a duplicate.

16:23 5 MR. BONHAM: 11 and 12 are moot. And 13 is moot.

6 And 14 is the one where, again, Mr. Strother  
7 wants an instruction. We think that there's already summary  
8 judgment on this. We filed a no-evidence motion. They  
9 didn't carry their burden. It's already been decided.

16:23 10 THE COURT: Contributory infringement?

11 MR. BONHAM: No. Innocence infringement.

12 MR. STROTHER: I'd like to correct Mr. Bonham.

13 We did meet our burden. We put forth some  
14 evidence of innocent infringement. What Judge Atlas ruled  
16:24 15 was that as matter of law, not because of evidentiary  
16 issues, because you have submitted evidence. He submitted  
17 evidence of the Mount Vernon plan and the Nagle plan that  
18 showed copyright on that. And, so, she said, as a matter of  
19 law, you can't claim innocent infringement.

16:24 20 So, this instruction only pertains to the  
21 remaining three that they did not put forth any evidence on  
22 and that we did.

23 THE COURT: Okay. Don't forget. I need one last  
24 page. That's all we need, is the heading of the case,  
16:24 25 "Verdict".



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1 MR. BONHAM: "We, the jury" --

2 MR. ZUMMO: Signature and date.

3 THE COURT: "...return the foregoing as our  
4 unanimous verdict."

16:24 5 Okay. It's now 4:25. What time do you want  
6 me to be back out? Because we need to do some work  
7 ourselves. We won't stick around far into the evening, but  
8 I'll come back in and, if you haven't resolved anything,  
9 I'll be ready to rule.

16:25 10 MR. ZUMMO: I have got two suggestions to talk to  
11 Mr. Strother about on the specifics the Court identified. I  
12 think we can do it in 15 or 20 minutes.

13 MR. STROTHER: Okay.

14 THE COURT: As far as we're concerned, I am going  
16:25 15 to give myself a half hour. I'll be back out right about  
16 five minutes to 5:00. If I am running late I will let you  
17 know. And then we'll put it all in the record, maybe get  
18 the court reporter out of here early.

19 All right. Thanks for working on it.

16:55 20 (Recess)

21 THE COURT: All right. We're going to go down page  
22 by page. Let's see where you are.

23 Okay. I am on No. 1. Have you reached any  
24 agreement on No. 1?

17:39 25 MR. BONHAM: Just that one sentence.

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1 MR. STROTHER: One sentence.

2 THE COURT: Which one? "These are not themselves  
3 protected"?

4 MR. STROTHER: Yes, Your Honor.

17:39 5 MR. BONHAM: Yes.

6 THE COURT: Are you still hung up?

7 MR. BONHAM: We want it in. He does not.

8 THE COURT: The rule is that it goes in. So, your  
9 objection is overruled. That one sentence goes in.

17:39 10 Wait a second. Then we have the  
11 Defendants' -- you're entitled to a ruling because you have  
12 Defendant proposed additional language, right, on the second  
13 page?

14 MR. STROTHER: Yes, Your Honor.

17:39 15 THE COURT: That's refused.

16 MR. STROTHER: Thank you, Your Honor.

17 THE COURT: I just want to make sure your record is  
18 protected.

19 MR. STROTHER: Thank you Your Honor.

17:39 20 THE COURT: Because that's it. Nothing tomorrow  
21 morning.

22 No. 2 you had all worked out.

23 MR. BONHAM: We had that all worked out.

24 THE COURT: No. 3 there was no problem.

17:39 25 No. 4 no problem.

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1 MR. BONHAM: Nothing on No. 4. And this is  
2 something that, trying to -- by cutting all this out you're  
3 going to have to have something whether you go with his  
4 agreed instruction or our -- his instruction or our  
17:40 5 instruction. We notice that there is not a definition of  
6 the word "original". So, what we are proposing is that we  
7 change this instruction to just be "Originality" and that we  
8 use the --

9 THE COURT: A definition of that?

17:40 10 MR. BONHAM: -- a definition of that that's in the  
11 third paragraph of that.

12 THE COURT: Any objection?

13 MR. STROTHER: No objection?

14 THE COURT: No objection. It's in.

17:40 15 MR. BONHAM: Let me read it in the way that we were  
16 discussing. It will be: "'Original', as that term is used  
17 in copyright law, means only that the work was independently  
18 created by the author as opposed to copied from other works  
19 and that it possesses at least some minimal degree of  
17:40 20 creativity. It does not need to be unique or novel."

21 MR. STROTHER: I have a problem with that "It does  
22 not need to be unique or novel."

23 MR. BONHAM: Okay. Again --

24 THE COURT: Do you want a ruling on it?

17:41 25 MR. BONHAM: Please.

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1 THE COURT: It's out. I think, if you agreed on  
2 the other, that that's out.

3 So, in effect, as far as that goes, that's  
4 your tender of that additional phrase, that sentence.

17:41 5 Correct?

6 MR. BONHAM: Yes, sir.

7 THE COURT: Tender is denied. Because I'm not  
8 going to go back and re-rule, but, if you need protection on  
9 your objections, now is the time.

17:41 10 Okay. No. 5.

11 MR. BONHAM: Again, we're still -- 5, 6 -- We have  
12 the one where he's wanting 5, 6 -- 5 through 8 and we're  
13 wanting it to be 9 and 10. So...

14 THE COURT: Hang on. All right. You can't agree  
17:41 15 on No. 5. Correct?

16 MR. STROTHER: Correct.

17 MR. BONHAM: Correct.

18 THE COURT: This is submitted by the Defendant.  
19 Tender is refused.

17:41 20 No. 6. You still have disagreements on that?

21 MR. ZUMMO: Yes.

22 THE COURT: I am going read it in. Take a look at  
23 what I did. I chopped it up. I am going to read in what's  
24 in. It's granted, meaning your instruction submitted by the  
17:42 25 Defendant is granted, but only to this extent.

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1                   The paragraph "Although..." and through the  
2 word "protected" is in.

3                   MR. ZUMMO: That's the Headnote 29. Correct?

4                   THE COURT: That's correct. Yeah.

17:42 5                   And then the last sentence of that first  
6 paragraph, "Infringement, therefore, requires copying of  
7 constituent elements of the work that are original..." --  
8 that is in. Got it?

9                   MR. BONHAM: Got it.

17:42 10                  THE COURT: Also, in the next paragraph -- the only  
11 one that's in from the next paragraph is the first sentence.  
12 "The protected elements of an architectural work do not  
13 include the individual standard features, such as windows,  
14 doors and other staple building components." And my note  
17:43 15 here is you can argue the rest.

16                  MR. BONHAM: Okay.

17                  THE COURT: The same thing. Now let's move down to  
18 the very last sentence down below, that "To support a claim  
19 of copyright infringement the copy must bear a substantial  
17:43 20 similarity to the protected aspects of the original." That  
21 is in, but I don't want that "protected aspects" bolded.

22                         Now, it's submitted by the Defendants. So,  
23 that's what's granted. All other tender is denied.

24                  MR. STROTHER: Thank you.

17:43 25                  THE COURT: Okay. Let's look at No. 7. Where are

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1 you on No. 7?

2 MR. STROTHER: We never -- We tried.

3 MR. BONHAM: We tried.

4 MR. STROTHER: We never got to -- We never

17:43 5 concluded --

6 THE COURT: I have one question. All right. I  
7 will tell you what I am going to do. Get ready.

8 I am granting -- This is submitted by the  
9 Defendants. Granted as to the first paragraph. Denied as  
10 to the last two paragraphs.

17:44

11 Take a look. So, your tender is denied on the  
12 second and third paragraphs. However, there was a question  
13 about the word "denied".

14 MR. BONHAM: "Denied". And also the last sentence  
15 where it says "is lacking in the originality that is  
16 required for copyright protection," because that now seems  
17 to undercut the fact that we already got a finding that we  
18 have valid copyrights.

17:44

19 MR. ZUMMO: What we proposed, Your Honor, and --  
20 Our problem on this paragraph was really that it made what  
21 Mr. Strother thought was a very unruly instruction.

17:44

22 We believe, as the Plaintiff, that the scènes  
23 à faire is a "substantial similarity" concept.

24 It should read that "Under the doctrine of  
25 scènes à faire, the presence of expressions that are

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1 standard stock or common to a particular topic or that flow  
2 necessarily or naturally from a common theme or setting or  
3 are common to the treatment of a particular idea, process or  
4 discovery in the works being compared is not, on its own,  
17:45 5 evidence of copy." And I believe that's an accurate  
6 statement of how the doctrine works.

7 THE COURT: Okay.

8 MR. STROTHER: The "evidence of copying" part of  
9 that tender I object to and disagree with. A solution to  
17:45 10 getting rid of the word "deny" I am okay with.

11 THE COURT: What? What's your suggestion? What  
12 word can we plug in there?

13 "Under the doctrine of scènes à faire  
14 copyright protection is denied..." what? Well, give me some  
17:45 15 suggestions, guys. That's where we're at.

16 MR. STROTHER: Your Honor, I am pulling up a  
17 thesaurus to see if something --

18 THE COURT: "Foreclosed" or --

19 MR. STROTHER: "Copyright is not 'extended' to  
17:46 20 those expressions...'

21 MR. BONHAM: It's still -- This is all sounding  
22 like it's undercutting the fact that we have valid  
23 copyrights.

24 MR. STROTHER: But the question of valid copyright  
17:46 25 is not even before the jury. The issue of protectable and

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1 non-protectable elements is.

2 MR. BONHAM: But, when you talk about the  
3 originality that is required for copyright protection or  
4 copyright protection is denied, now you're undercutting that  
17:46 5 ruling.

6 MR. STROTHER: I disagree. I mean, I don't even  
7 have a big problem with "copyright protection is denied"  
8 because that's a truthful statement and accurate statement  
9 of the law.

17:46 10 THE COURT: Give me an alternative to "denied".

11 MR. ZUMMO: The concept is these things should not  
12 be considered, just on their own, as evidence of similarity,  
13 maybe. Does that work?

14 MR. STROTHER: No. No, because this goes, in my  
17:46 15 opinion -- well, my opinion -- I'm sorry. This is case law.  
16 The filtration that must be done -- that's when scènes à  
17 faire comes into play. These elements that fall into the  
18 doctrine of scènes à faire are filtered out before they do  
19 their comparison.

17:47 20 THE COURT: What alternative do you have to  
21 "denied"? It's coming down to that. Let me at least  
22 listen.

23 MR. ZUMMO: I think, Your Honor --

24 THE COURT: Or, if you have an objection, you need  
17:47 25 to object to the whole thing in that form without you



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1 jumping in with another word.

2 MR. ZUMMO: With another word, yes, sir.

3 Well, first, we object to the first paragraph  
4 of Defendants' Proposed Instruction No. 7 because it  
17:47 5 misstates doctrine of scènes à faire as one that either  
6 denies copyright protection or that states that certain  
7 things are lacking in the originality that is required for  
8 copyright protection. We --

9 THE COURT: Okay. Objection is overruled.

17:47 10 Now, as an alternative -- do you have an  
11 alternative relative to that word? If not, stand on your  
12 objection.

13 MR. ZUMMO: I have an alternative.

14 THE COURT: Yes, sir. What is it?

17:48 15 MR. ZUMMO: The alternative would read: "Under the  
16 doctrine of scènes à faire, the presence of expressions that  
17 are standard stock or are common to a particular topic or  
18 that flow necessarily or naturally from a common theme or  
19 setting or that is common to the treatment of a particular  
17:48 20 idea, process or discovery to what it's being compared is  
21 not, on its own, evidence of copying."

22 THE COURT: Tender is denied. It will stay the way  
23 it is, but you certainly can argue around it.

24 The merger doctrine submitted by the  
17:48 25 Defendant. The Plaintiff objects to it completely.

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1 Correct?

2 MR. ZUMMO: Correct, Your Honor.

3 THE COURT: Okay. The entry by Defendant is  
4 granted. Objection is overruled. It is in.

17:49 5 Okay. Now we come to No. 9.

6 MR. STROTHER: I believe we have fixed that one.

7 Do you believe so, Mr. --

8 MR. BONHAM: We have.

9 THE COURT: Well, that helps, because I had yellow  
17:49 10 and I had -- You have cured -- As far as you're concerned,  
11 what you're suggesting is agreed to. Is that correct?

12 MR. BONHAM: That is correct.

13 THE COURT: As to form only. All right. As to  
14 form.

17:49 15 MR. ZUMMO: And as revised by agreement.

16 THE COURT: As revised.

17 MR. STROTHER: Yes, sir.

18 THE COURT: All right. That's granted. I don't  
19 need to see it. Just do it and put it in. Because I had  
17:49 20 all kinds of rulings on that.

21 So, now we jump to what page?

22 MR. BONHAM: 17.

23 THE COURT: We jump to Page 17 and this is  
24 "Substantial Similarity".

17:49 25 MR. BONHAM: Correct.

*Charge Conference*

1 THE COURT: Now, this one, the Plaintiff's proposed  
2 instruction.

3 MR. BONHAM: There is a typo on the third line. It  
4 refers to the wrong party, which will be fixed, of course.

17:50 5 THE COURT: Okay. Have you worked anything out on  
6 that?

7 MR. STROTHER: No, Your Honor.

8 MR. BONHAM: We tried but haven't been able to do  
9 it.

17:50 10 THE COURT: All right. Your tender of Instruction  
11 No. 10, Plaintiff's, is denied.

12 As far as the Defendants' proposed  
13 instruction, it's granted, except -- now you can take a  
14 look -- except the first sentence is out, that "Copying, on  
17:50 15 its own, is not legally actionable." That's out.

16 The last sentence in the first paragraph  
17 beginning with "Substantial" and ending with "another work"  
18 is out.

19 And in the last paragraph the last sentence is  
17:50 20 out, "In determining" through the word "to works" is out.

21 All right. No. 11.

22 MR. BONHAM: On 11 I guess the real question is:  
23 Is Jury Question No. 14 going to be offered?

24 THE COURT: Hang on a second. Question No. 14.

17:51 25 MR. ZUMMO: It's the very last page.

*Charge Conference*

1 THE COURT: That's out.

2 MR. BONHAM: Okay.

3 THE COURT: That is out. Denied. Question No. 14  
4 submitted by the Defendant is denied. It's out.

17:51 5 Therefore, No. 11.

6 MR. ZUMMO: We withdraw.

7 THE COURT: Okay. That's withdrawn. Let me write  
8 that. That is withdrawn.

9 MR. BONHAM: We have got a solution on No. 12.

17:52 10 THE COURT: Okay.

11 MR. BONHAM: With that --

12 THE COURT: I don't need the solution if you've  
13 agreed to it. Okay.

14 13.

17:52 15 MR. STROTHER: I don't believe we have reached any  
16 solutions to any of the --

17 THE COURT: Now, you notice I have that with a  
18 paperclip because -- I have all of that going from 13  
19 through 16 and then the suggested No. 17. Okay?

17:52 20 MR. BONHAM: Okay.

21 THE COURT: Have you agreed on anything here?

22 MR. BONHAM: We have not.

23 MR. STROTHER: No, Your Honor.

24 THE COURT: All right. Every once in a while you  
17:52 25 come across -- in every jury charge you come across

## Charge Conference

1 something that I think could be a reversible matter. Again,  
2 I'm not an expert in this, but I am looking at it. I have  
3 done it a long time, as have you. Some of you, you earn  
4 your living in this area.

17:52 5 The safer way maybe -- and I am looking at the  
6 Plaintiffs at this point -- is to work with some sort of a  
7 conglomeration of the Defendant. The damages, the profits  
8 question, they have No. 17. And we talked about it  
9 beforehand. Some you can live with, some that you can't.

17:53 10 I am asking now the Plaintiffs: Do you  
11 absolutely want to go with 13, 14, 15 and 16 and the request  
12 that I deny 17, the tender on 17?

13 MR. ZUMMO: Yes, Your Honor, because we were not  
14 able to work out any agreement.

17:53 15 THE COURT: Okay. Then, the Defendants' objections  
16 to 13, 14, 15, and 16 are overruled. It's going in. And,  
17 therefore, the tender of the Defendants' No. 17 is denied.  
18 I think that protects everybody.

19 Everybody agree?

17:53 20 MR. ZUMMO: Yes, Your Honor.

21 THE COURT: Are you satisfied with that?

22 MR. STROTHER: My record --

23 THE COURT: You may not be satisfied with it, but  
24 is your record protected?

17:54 25 MR. STROTHER: Yes, Your Honor.

## Charge Conference

1 THE COURT: You objected to all of those. Those  
2 objections are overruled. Those four are coming in. And  
3 your substitute instruction No. 17 is denied. Okay?

4 No. 18 is out. Correct?

17:54 5 MR. BONHAM: No.

6 THE COURT: Or is it? "See alternate instruction."

7 MR. BONHAM: Correct.

8 THE COURT: "See alternate instruction."

9 MR. BONHAM: And the question on this is whether or  
17:54 10 not the last paragraph that the Defendants have offered  
11 comes in or not.

12 THE COURT: Have you agreed on anything here?

13 MR. BONHAM: We have not.

14 THE COURT: Okay. The Plaintiff's submission of  
17:54 15 No. 18 is granted. The objection is overruled.

16 Now, I am adding to Instruction 18 the first  
17 sentence in the Defendant's submission on the last page  
18 where it says -- I am allowing this in -- "To determine the  
19 number of violations, you are to consider only the number of  
17:55 20 individual acts as committed by a defendant that violated  
21 this law." All the other tender, then, of the defense is  
22 denied. Tender is refused. And that's the only sentence  
23 that goes there. The rest of it is denied.

24 No. 19.

17:55 25 MR. BONHAM: 19 we have a directed verdict on that.

*Charge Conference*

1 That's out.

2 THE COURT: Now, "Contributory Infringement". You  
3 object to that on principle. You object to it --

4 MR. STROTHER: Yes, Your Honor.

17:55 5 THE COURT: -- to the whole thing? That's denied.

6 Instruction No. 20 is in. It's granted.

7 How about 21?

8 MR. BONHAM: The only thing is the Defendant's  
9 proposed additional language, which I think is now picked up  
17:55 10 by the prior rulings.

11 MR. STROTHER: I will withdraw that, now that we  
12 have that definition.

13 THE COURT: Thank you. That's withdrawn. So,  
14 granted as to No. 21, but there is no objection to it, in  
17:55 15 effect.

16 MR. BONHAM: Correct.

17 MR. ZUMMO: Correct, Your Honor.

18 THE COURT: Now let's take a look. Now, you needs  
19 some rulings on these questions. Right?

17:56 20 MR. STROTHER: On 2 and 4.

21 MR. BONHAM: You're correct. I apologize.

22 MR. ZUMMO: 2 and 4, yes.

23 THE COURT: Defendant's objection to the submission  
24 of Question No. 2 is denied. In effect, overruled.  
17:56 25 Objection overruled.

*Charge Conference*

1                   Objection overruled, by the defense, as to  
2 Question No. 4.

3                   Now we're at No. 6.

4                   MR. BONHAM: Correct.

17:56 5                   THE COURT: Have you worked anything out?

6                   MR. BONHAM: We have not.

7                   MR. STROTHER: No, Your Honor.

8                   THE COURT: As to No. 6, the Plaintiff's proposed  
9 language is granted. The Defendants' proposed language is  
17:56 10 denied. It's overruled. Tender of that is denied.

11                   How about No. 8?

12                   MR. BONHAM: Same issue.

13                   THE COURT: Again, same ruling. Granted as to the  
14 Plaintiff's proposed language. Denied as to the tender of  
17:57 15 the Defendants' proposed language.

16                   You have agreed on No. 9.

17                   MR. BONHAM: Correct.

18                   THE COURT: Now we have No. 10.

19                   MR. BONHAM: We have not.

17:57 20                   MR. STROTHER: Correct. We haven't figured this  
21 out.

22                   THE COURT: At that point, the Question No. 10, the  
23 Plaintiff's proposed language is granted. The Defendants'  
24 tender is overruled as to proposed No. 10. Granted as to  
17:57 25 the Plaintiff.



## Charge Conference

1 No. 11 is moot.

2 I think 12 is moot.

3 MR. ZUMMO: Yes, Your Honor.

4 THE COURT: 13 moot. And No. 14 is out.

17:57 5 MR. ZUMMO: Yes, sir.

6 THE COURT: Okay.

7 MR. ZUMMO: So, we need the verdict form to be  
8 added --

9 THE COURT: Correct.

17:57 10 MR. ZUMMO: -- as instructed by the Court.

11 THE COURT: Now, let me tell you how many copies  
12 we'll need.

13 MR. BONHAM: Ellen told me 15.

14 THE COURT: We have got eight on the jury. Right?

17:58 15 We have got five of our staff. Right? We have got the  
16 court reporter and we have four interns. Right? What does  
17 that add up to?

18 LAW CLERK: We usually ask for 20, sir.

19 THE COURT: More than that. Right? Eight for the  
17:58 20 jury. Five for our full-time staff including the Judge.  
21 Right?

22 LAW CLERK: Yes, sir.

23 THE COURT: Five. One for the court reporter. So,  
24 what is that? Eight, 13, 14, 18. Plus, one becomes the  
17:58 25 original or one gets a blue back on it.

*Charge Conference*

1                   So, tomorrow we begin at 11:30. At eleven  
2 o'clock I will need -- Oh, yeah, Judge Atlas. I talked to  
3 her. I'm keeping her informed. We'll need 25 on Ellen's  
4 desk at eleven o'clock.

17:59 5                   MR. ZUMMO: And, Your Honor, the double-spacing,  
6 does that extend to the questions that's being asked?

7                   THE COURT: Oh, yeah. I think so.

8                   MR. ZUMMO: The whole thing.

9                   THE COURT: The whole thing.

17:59 10                  MR. BONHAM: I think they're pretty much already --  
11 I will make sure everything is double-spaced.

12                  THE COURT: Yeah. It makes it a lot easier. And  
13 that's how we'll do it.

14                  They'll grab a bite to eat earlier and we'll  
17:59 15 go straight through.

16                  I will tell you this. I will tell this to the  
17 jury. I have done this with every jury since state court,  
18 including being downtown late. I allow the jury to  
19 deliberate each day until 6:00 p.m., but we'll not take a  
17:59 20 verdict after 5:00 p.m. So, around 5:05 if there is no  
21 indication they're coming out with a verdict yet, then we'll  
22 come in and say we're all gone.

23                  Like the last case. They decided the case at  
24 about 5:45 and they sealed it up; and, as you know, there is  
18:00 25 a procedure on sealing it up. They seal it and sign it and

## Charge Conference

1 then the next morning you give it to the presiding juror who  
2 opens it up and confirms that's the verdict.

3 So, that's how we're doing it.

4 All right. It's an interesting case. It will  
18:00 5 be interesting to see how you're going to walk them all  
6 through it.

7 Thank you for your work on it. It's been  
8 really a pleasure. In other words, you have been at each  
9 other as advocates, but it's a good professional job. I  
18:00 10 appreciate the guidance you have given to me.

11 Thank you, Bruce, for sticking around.

12 THE COURT REPORTER: Yes, sir, as always.

13 THE COURT: Never forget the court reporter.

14 And tomorrow we'll see you at 11:30.

18:00 15 MR. ZUMMO: Thank you, Your Honor.

16 MR. BONHAM: Thank you, Your Honor.

17 MR. STROTHER: Thank you, Your Honor.

18 THE COURT: Thank you so much.

19

20 COURT REPORTER'S CERTIFICATE

21 I, BRUCE SLAVIN, certify that the foregoing is a  
22 correct transcript from the record of proceedings in the  
23 above entitled matter, to the best of my ability.

24

25 s/Bruce Slavin  
BRUCE SLAVIN, RPR, CMR

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